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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1710~~ 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC., CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORP., JACKSON TELEVISION, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the

Supreme Court of the United States

October Term, 1970

No. .....

Lamar Life Broadcasting Company,

Petitioner,

—v.—

Federal Communications Commission, United States of America, Channel 3, Inc., Civic Communications Corp., Communications Improvement, Inc., Dixie National Broadcasting Corp., Jackson Television, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the Federal Communications Commission is officially reported at 26 F.C.C.2d 100 (1970), and is reproduced in the appendix to this petition. (A.1) The Order of the United States Court of Appeals for the District of Columbia Circuit is not officially reported, but is reprinted in the appendix to this petition. (A.23)

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 17, 1971. (A.23) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), are violated by a decision and order of the Federal Communications Commission which deprives a validly licensed television station operator of authority to operate that station and enjoy the fruits therefrom, where its pending application for renewal of license was timely and properly filed and has received no final disposition by the agency, and where the only properly made factual determination as to whether said application should be granted was resolved in favor of the applicant?

STATUTORY PROVISIONS

Section 307(d) of the Communications Act of 1934, as amended (47 U.S.C. § 307(d)), provides in pertinent part:

> "... Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, ... if the Commission finds that public interest, convenience, and necessity would be served thereby. ... Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission *shall* continue such license in effect...." (Emphasis supplied.)

Section 9(b) of the Administrative Procedure Act (5 U.S.C. § 558(c)), provides in pertinent part:

> "When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely

> affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. . . . When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." [1]

STATEMENT

Petitioner (hereinafter "Lamar") operated television station WLBT, Jackson, Mississippi, pursuant to a validly granted license, regularly renewed, from 1952 until 1964, when a petition to deny Lamar's renewal application was filed, alleging that Lamar had failed to serve the needs of the black community. The Federal Communications Commission, however, granted Lamar a one year renewal of license (*Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965)). The lower court reversed and ordered a full evidentiary hearing,[2] after which the Hearing Examiner ren-

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[1] In addition, the Federal Communications Commission's Rules, Section 1.62(a)(1), 47 C.F.R. § 1.62(a)(1), implementing the statutes, contain the same express provision:

> "§1.62 Operation pending action on renewal application.
>
> (a)(1) Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license with respect to any activity of a continuing nature, in accordance with the provisions of section 9(b) of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application. . . ."

[2] Office of Communication of United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

dered an Initial Decision granting Lamar's renewal.[3] The Commission affirmed.[4] The lower court again reversed the Commission.[5]

Although the power to deny a renewal application is clearly reserved to the Commission, the court's decision appeared to direct a denial of Lamar's renewal application rather than to vacate the Commission's grant and to restore the application to pending status for further agency action. The allegations against Lamar had been resolved by both the Examiner and the Commission in Lamar's favor, but the court held that the agency had reached its conclusions on the basis of an improper allocation of the burden of proof. Instead of remanding the matter for correction by the agency, however, the court seemingly concluded that no further agency action on Lamar's renewal was required.

Petitions for rehearing were filed by both Lamar and the Commission on the ground that it is the Commission and not the court which has the power and the duty to dispose of renewal applications. Both also contended that Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 558(c), provide that a pending applicant for renewal of license *shall* remain as licensee, even after the expiration of his license term, until the pending application receives final disposition.[6]

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[3] Lamar Life Broadcasting Co., 14 F.C.C.2d 495 (1967).

[4] Lamar Life Broadcasting Co., 14 F.C.C.2d 431 (1968).

[5] Office of Communication of United Church of Christ v. FCC, 138 U.S. App. D.C. 112, 425 F.2d 543 (1969), rehearing denied *en banc*, 138 U.S. App. D.C. 120, 425 F.2d 550 (1969).

[6] The Commission's own rules, Section 1.62(a)(1), 47 C.F.R. § 1.62(a)(1), contain the same explicit provision.

By order of the court below, dated September 5, 1969, the petitions for rehearing were denied.[7] In an accompanying "Statement," Judges McGowan and Tamm sought to clarify the intent of the Court's decision of June 20, 1969, to conform it to the statutory directives.[8] The "Statement" expressly confirmed that the court did not direct a denial of Lamar's license, thus recognizing Lamar's pending renewal applicant status.[9] The court also noted the early expiration date of the then current license term, *i.e.*, June 1, 1970, and urged that a hearing to choose a licensee get underway promptly before that date among new competing applicants, including Lamar.[10] For the convenience of the Court, the June 20, 1969, and September 5, 1969 opinions of the Court of Appeals are reproduced in the appendix to this petition. (A.25 and A.39, respectively.)

On December 5, 1969, the Commission released an Order inviting new applicants for the facility. *Lamar Life Broadcasting Co.*, 20 F.C.C.2d 635 (1969). The Order vacated the grant of Lamar's renewal application and permitted Lamar

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[7] Office of Communication of United Church of Christ v. FCC, *supra*, 138 U.S. App. D.C. 112, 120, 425 F.2d 543 at 550.

[8] Judges McGowan and Tamm were the remaining two members of the panel which rendered the June 20, 1969, decision, the third member, Judge Burger, having meanwhile, on June 23, 1969, been sworn in as Chief Justice of the United States.

[9] The court, by way of dictum, expressed doubt that Congress intended that a hold-over licensee should continue in operation indefinitely merely because the Commission was unable or unwilling to conduct proceedings which will survive judicial scrutiny.

[10] Lamar did not seek appellate review of the lower court's action at that time because it concluded that the court had recognized its right to continue operating as a hold-over licensee until an expedited hearing could be held by the agency to determine whether its license would be renewed for the new term commencing June 1, 1970, or whether a license would be granted to one of the new applicants who, by statute, may compete with an existing renewal applicant.

to file a new Form 301 application rather than "amend the pending renewal application, form 302." 20 F.C.C.2d at 636. The Commission emphasized that "there had [*sic*] been no '* * * denial of the license renewal application' . . . ." 20 F.C.C.2d at 635. Despite this protestation, the clear-cut effect was to deny Lamar its rights as a renewal applicant.[11]

On April 27, 1970, three applications for interim authority to operate WLBT pending the resolution of the comparative hearing on the several applications which had been submitted were filed. These were: (1) Channel 3 of Jackson, a Joint Venture (composed of three of the permanent applicants); (2) Communications Improvement, Inc. (CII), a non-permanent, non-profit applicant; and (3) Lamar, which again asserted its statutory right to continue to operate as a hold-over licensee, but which also tendered an interim proposal for consideration with the others.

By Order of March 12, 1970, the Commission expressly stated that no hearing or oral argument would be permitted on the interim applications. *Lamar Life Broadcasting Co.*, 22 F.C.C.2d 47, 48 (1970).[12] In filing its interim proposal, Lamar reserved the right to challenge this peremptory procedure and asserted that challenge in its appeal to the court below.

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[11] On February 3, 1970, Lamar filed a new application under protest and tendered a major amendment to its pending renewal application.

[12] This summary procedure was contrary to the procedure followed by the Commission in two other cases involving AM radio stations in which it had authorized interim proposals. Oak Knoll Broadcasting Corp., 2 Pike & Fischer Radio Regulation 2d 1011 (1964); Pike-Mo Broadcasting Co., 2 F.C.C.2d 207 (1965), *aff'd*, Beloit Broadcasters, Inc. v. FCC, 125 U.S. App. D.C. 29, 365 F.2d 962 (1966). In both cases the Commission afforded oral hearings or oral argument—in one, before the full Commission; in the other, before the Commission's Review Board.

On September 8, 1970, the Commission released its decision—without hearing or oral argument—rejecting Lamar's contention that it had the statutory right to continue to operate WLBT under Section 307(d) of the Communications Act and granting the application of CII. (A.1)

Lamar appealed the September 8, 1970, Order and, on September 23, 1970, filed a motion for stay coupled with a request for immediate decision on the merits and for other relief. Because of the request for immediate decision on the merits, Lamar specifically requested oral argument of the duration allocated for arguments on the merits.

On March 17, 1971, the court below, acting through a two-judge panel, filed a *per curiam* Order, without having heard oral argument, in which Lamar's appeal *on the merits* was given summary disposition in one sentence, to wit:

> "ORDERED by the Court that applicant's motion for immediate decision on the merits is granted and the order of the Federal Communications Commission, appealed from herein, is hereby affirmed . . ." (A.24)[13]

The effect of the lower court's summary action is to deprive Lamar of its statutory and property rights, without having had an opportunity for oral hearing or argument at either the agency or judicial level. Indeed, the court's action deprives Lamar of such rights even though the only factual determinations which have been made were resolved in Lamar's favor. Moreover, the court's holding is at odds with two mandates of the Congress and a prior decision by the same court.

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[13] Lamar filed a timely petition for rehearing and suggestion for rehearing *en banc* which was denied on April 30, 1971. (A.43, 44) A motion to stay the mandate of the lower court pending a petition to this Court for a writ of certiorari was granted on May 14, 1971. (A.45)

REASONS FOR GRANTING THE WRIT

The Commission's Decision, as Affirmed by the Court Below, Is in Conflict With the Mandates of the Congress Expressed in Both the Communications Act and the Administrative Procedure Act.

Section 307(d) of the Communications Act of 1934, as amended, and Section 9(b) of the Administrative Procedure Act, guarantee to the licensees of broadcast stations that their licenses shall remain in effect until the Commission shall have made final disposition of their timely and properly filed applications for renewal of license. The essence of the broadcast license is the right to operate. Without such right, the license is meaningless. Further, the right to operate carries with it the right of the licensee to enjoy the fruits or suffer the losses from such operation.

Acting pursuant to these statutory provisions and its own Rule 1.62(a)(1), which implements them, the Commission, until the decision in this case, has regularly and routinely permitted broadcast licensees to operate beyond the expiration date of their licenses pending Commission action on their renewal applications. Without such statutory safeguards, the Commission would be free to permit licenses to expire by sheer delay or inaction if it determined that an incumbent licensee did not suit its fancy. Indeed, the legislative history of Section 9(b) of the Administrative Procedure Act indicates that it was the desire of Congress to circumvent such dangers that prompted the language of that section:

> "These special provisions are necessary because of the very serious consequences of the conferring of licensing authority upon administrative agencies. If agencies are dilatory . . . parties are subjected to ir-

reparable injuries unless safeguards are provided." Legislative History of Administrative Procedure Act, 79th Cong., 2d Sess., Senate Doc. No. 248, p. 368.

In the instant case, there is no question that Lamar filed a timely and proper application for license renewal, thus bringing it within the statutory safeguards of Sections 307(d) of the Communications Act and 9(b) of the Administrative Procedure Act until final agency disposition of its application. After full evidentiary hearing, in which the agency resolved all material adverse factual allegations in Lamar's favor and granted renewal, the court below reversed on the ground that the case had been conducted under an improper allocation of the burden of proof and because the Commission's decision, in the court's view, was not supported by the substantial evidence of record. The court remanded, ordering the grant of the renewal application vacated.

At this point it was the limit of the court's power to remand to the agency for further hearing on the factual allegations or for a reconsideration by the agency of its decision. *FRC* v. *Nelson Bros. Co.*, 289 U.S. 266, 274-78 (1933); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 120 U.S. App. D.C. 264, 270, 345 F.2d 954, 960 (1965), *cert. denied*, 383 U.S. 906 (1966).

The court, however, exceeded its power by directing that no new hearing on or further consideration of the pending renewal application was required. Instead, the court ordered that new applications for the license be invited, with Lamar being accorded the "privilege" of filing a new application. Whatever may have been its other errors, at least the court recognized that Lamar was not disqualified

to be a licensee. Acting pursuant to the remand, the Commission invited new applications, directed Lamar to file a new application and, in designating that application for hearing with those of competing applicants, expressly recognized that Lamar's renewal application was still pending. Action on that application was deferred until after the Commission could determine whether Lamar's new application or that of one of the competing applicants should be granted. *Lamar Life Broadcasting Co.*, 25 F.C.C. 2d 101 (1970).

Thereafter, the Commission invited applications for interim authority to operate WLBT while the comparative hearing to determine a permanent licensee was conducted. The Commission then granted interim operating authority to Communications Improvement, Inc., and denied Lamar's request that its statutory right to operate as a "hold-over" *licensee under Section 307(d) of the Communications Act* be recognized. The court below affirmed.

Thus, the Commission and the court, while recognizing the pendency of Lamar's renewal application without final action, have directed Lamar to be treated as a new applicant and have stripped it of its statutory right to operate as a pending renewal applicant. This both the Commission and the court did, without hearing and without oral argument, even though the only factual determinations with respect to Lamar's qualifications had been resolved by the agency in Lamar's favor.

The result is to read out of the law the statutory safeguards provided to broadcast licensees in not one, but two statutes, the protective language of which is clear, unambiguous and mandatory.[14]

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[14] The holding of the court below is also squarely in conflict with the thrust of the language of that court in a prior decision involv-

The practical effect of the decision is to deny to Lamar the intended use of its facilities and to deprive Lamar of the profits from such use. If the right to operate is taken from the owner, the value of the physical broadcast plant is immediately and substantially reduced. According to a recent appraisal, Lamar's television property alone—licensed, in place and operating—has a fair market value approximating at least $7,000,000. The transmission equipment has a unique value that exists only by virtue of the license to operate. If that license is taken, the physical plant must be sold either for salvage value, as used equipment for use elsewhere, or to a single potential purchaser, chosen by the Federal Communications Commission, under distress conditions. Of even greater consequence, the profits from the operation of the station, which approximated $500,000 annually before taxes in 1968 and 1969, will be *lost to Lamar.*[15]

The legal effect of the grant of interim operating authority to CII is to deny Lamar's renewal application without hearing and without oral argument, before either the

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ing an interim operating grant. Consolidated Nine, Inc. v. FCC, 131 U.S. App. D.C. 179, 403 F.2d 585 (1968). There the existing operator, unlike Lamar, had never held a valid license, had not filed a renewal application and did not claim "hold-over" renewal applicant status. In distinguishing that situation from other cases, the court expressly recognized that " . . . under Section 307(d) . . . a timely application for *renewal* of a valid license keeps the original license in effect until the renewal application has been acted upon." (Emphasis in original; 131 U.S. App. D.C. 179 at 188, 403 F.2d 585 at 594.)

[15] The profits in 1970 were considerably lower, reflecting the down-turn in the economy. However, even if Lamar leases its physical facilities to an interim operator, the return will be far less than that received as a licensee. In current negotiations with CII, the highest temporary rental figure, subject to arbitration up or down, suggested by CII is less than one-half the cash flow from the operation of WLBT in 1968 and 1969.

agency or the court, thus depriving Lamar of its statutory rights in contravention of the safeguards accorded to Lamar by both the Communications Act and the Administrative Procedure Act.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

FCC 70-957
52395

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

File No. BPCTI-10

LAMAR LIFE BROADCASTING COMPANY
Jackson, Mississippi

File No. BPCTI-9

CHANNEL 3 OF JACKSON, A JOINT VENTURE
Jackson, Mississippi

File No. BPCTI-11

COMMUNICATIONS IMPROVEMENT, INC.
Jackson, Mississippi

For Interim Authority

MEMORANDUM OPINION AND ORDER

Adopted: September 3, 1970; Released: September 8, 1970

By the Commission: Chairman Burch concurring and issuing a statement; Commissioners Bartley and Wells dissenting; Commissioner Robert E. Lee concurring in the result; Commissioner H. Rex Lee absent.

1. Now under consideration are the captioned applications, each seeking interim authority to operate a commercial television broadcast station on channel 3, Jackson,

Mississippi, and related pleadings in support of, or in opposition to, those applications.[1] Interim applications had been invited in a previous Order, *Lamar Life Broadcasting Company,* 20 FCC 2d 635 (1969).[2] Lamar Life Broadcasting Company (Lamar) is the present operator of station WLBT(TV) channel 3, Jackson. Channel 3 of Jackson, A Joint Venture (Venture) is composed of three applicants for regular authorization on channel 3, Jackson. The joint venture is open-ended and all applicants for regular authorization that are not already part of the joint venture have been invited to participate. Communications Improvement, Inc. (CII), is a non-applicant for regular authorization.

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[1] The related pleadings are: a petition to continue operation during the comparative hearing, filed February 3, 1970, by Lamar; a statement in support of its interim application, filed April 27, 1970, by Lamar; a statement opposing Lamar's application for interim authority, filed May 7, 1970, by Civic Communications Corporation (Civic) (Civic is an applicant for regular, but not interim, authorization on channel 3, Jackson); a response to Lamar's statement in support of its interim application, filed May 8, 1970, by Venture; a letter filed May 8, 1970, by Venture, opposing CII's application for interim authority; a petition to deny Venture's application for interim authority filed May 13, 1970, by Lamar; a petition to deny CII's application for interim authority, filed May 13, 1970, by Lamar; Lamar's reply to Venture's response and to Civic's statement, filed May 13, 1970; a letter filed May 14, 1970, by Civic, responding to Venture's letter of May 8, 1970; CII's opposition to Lamar's petition to deny and to Venture's letter of May 8, 1970, filed May 25, 1970; Venture's opposition to Lamar's petition to deny, filed May 27, 1970; a reply to CII's opposition, filed June 3, 1970, by Venture; Lamar's reply to Venture's opposition, filed June 9, 1970; Lamar's reply to CII's opposition, filed June 9, 1970; Venture's response to Lamar's reply, filed June 12, 1970; Lamar's motion to strike Venture's response, filed June 16, 1970; and Venture's opposition to the motion to strike, filed June 19, 1970. In our discretion, we accept Venture's June 12 pleading. CII has requested a waiver of the $150 filing fee. Since it proposes to operate commercially on a commercial channel, the filing fee is required and its request is denied.

[2] The cut-off date for filing interim applications was set in *Lamar Life Broadcasting Company,* 22 FCC 2d 47 (1970).

2. Lamar contends in its various pleadings that it is a renewal applicant and under section 307(d) of the Communications Act of 1934, as amended,[3] section 558(c) of the Administrative Procedure Act,[4] and section 1.62(a)(1) of the Commission's rules,[5] is entitled to continue operation on channel 3, Jackson, pending the comparative hearing and a final decision on its renewal application. Therefore, Lamar concludes that no interim authorization can be issued and that the interim applications of CII and Venture must be dismissed. Lamar has filed an interim application, but does not concede that it is required to do so.

3. Lamar's contention must be viewed in light of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Office of Communication of the United Church of Christ* v. *FCC,* Case No. 19,409, decided June 20, 1969, where the Court reversed and remanded the Commission's action in which it granted Lamar's application for renewal of license of station WLBT. The Court stated:

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[3] Section 307(d) provides in part; "Pending any hearing and final decision on such an application (for renewal of license) and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect."

[4] Section 558(c) provides in part; "When the licensee has made timely and sufficient application for renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."

[5] Section 1.62 provides in part; "(a)(1) Where there is pending before the Commission at the time of expiration of license any proper and timely application for renewal of license with respect to an activity of a continuing nature, in accordance with the provisions of section 9(b) [now section 558(c)] of the Administrative Procedure Act, such license shall continue in effect without further action by the Commission until such time as the Commission shall make a final determination with respect to the renewal application . . ."

> We are compelled to hold, on the whole record, that the Commission's conclusion is not supported by substantial evidence. For this reason the grant of a license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license. We do refrain, however, from holding that the licensee be declared disqualified from filing a new application; the conduct of the hearing was not primarily the licensee's responsibility, although as the applicant it had the burden of proof. Moreover, the Commission necessarily did not address itself to the precise question of WLBT's qualifications to be an applicant in the new proceeding now ordered, and we hesitate to pass on this subject not considered by the Commission.
>
> The Commission is directed to consider a plan for interim operation pending completion of its hearings; if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earning of the licensee should be impounded by the Commission pending final disposition of this license application. (Slip opinion, p. 13, footnote omitted.)

The statutes and the rule cited by Lamar, above, contemplate that in the normal course of events a renewal applicant will continue operation of the particular station until a final decision is rendered. If the renewal application is denied, the applicant is precluded from filing a new application for the same frequency. It is clear from the Court's decision, however, that if the Commission finds that the public interest would be better served, an interim operator other than Lamar can be authorized to operate the station prior to a final determination on Lamar's renewal application, and that Lamar can compete for the frequency.

4. In view of the possible conflict between the statutes and the Court's mandate, the Commission filed with the Court a "Petition for Rehearing or Clarification and Suggestion for Rehearing En Banc." The Commission urged that the Court:

> . . . clarify or modify its decision to provide (1) that the Commission set aside its grant of the WLBT renewal and reconsider the application and the record under an allocation of the burden of proof that is in accordance with the Court's opinion, and (2) depending on the outcome of (1) above, that in the proceeding very shortly to be held where new applicants for the channel are to be considered, WLBT may file a competing application in the form of a request for renewal of its authorization or, if it is found unqualified to receive renewal of its present authorization, that it is barred from further consideration. (Commission Brief, pp. 8-9.)

5. The Court denied rehearing in a *per curiam* decision dated September 5, 1969. The decision was accompanied by a statement by Judges McGowan and Tamm, who said, among other things:

> The Commission points to the provision of 47 U.S.C. §307(d) to the effect that, pending final disposition of a renewal application, the Commission "shall continue such license in effect." It says that this means that the licensee seeking renewal must be regarded as having continuing authority until its application has been finally disposed of adversely to it—and this last, so it is said, only the Commission can do. It is doubtful if Congress intended that a licensee should be able to remain in possession indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny . . . (Slip Opinion on rehearing, p. 3.)

Thus, in denying rehearing, the Court has, in effect, denied the contention made in our brief, and the arguments raised by Lamar here. Moreover, the Court stated that Lamar's operation on an interim basis was an alternative, not the only possibility. The language of Judges McGowan and Tamm on rehearing also indicates, in their view, that section 307(d) of the Act is not a bar to such an interim operation. We are compelled, therefore, to conclude under the direction of the Court that an interim operation other than Lamar can be authorized, and that section 307(d) of the Act is not a bar to such an interim authorization.

6. Venture contends that CII's application does not comply with section 1.592(b) of the rules[6] and with prior Court decisions; that there are unresolved public interest questions concerning the principals of CII; that there is an interrelationship between CII and Civic Communications Corporation, one of the applicants for regular authorization to operate on channel 3, Jackson; and, therefore, that CII's application should be dismissed.

7. We do not find that section 1.592(b) of the rules is a bar to the consideration of CII's application. That question

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[6] Section 1.592(b) provides: "When two or more applications for the same television assignment have been designated for hearing, the Commission may, if the public interest will be served thereby, make a conditional grant to a group composed of any two or more of the competing applicants, such grant to terminate when the successful applicant commences operation under the terms of a regular authorization. No conditional grant will be made unless all of the competing applicants have been afforded a reasonable opportunity to participate in the group seeking the conditional grant. In its application, the group shall include a special showing as to the need for the service pending operation by the successful applicant under the terms of a regular authorization; the effect, if any, of a grant on the position of any applicant which is not a member of the group; and any other factors which are deemed pertinent to the public interest judgment."

was raised in *Oak Knoll Broadcasting Corp.*, FCC 64-665, 2 RR 2d 1011 (1964). In that case we stated:

> 34. . . . The thrust of the argument is that the Commission's conditional grant rule (§1.592) does not contemplate a temporary authorization to a party not seeking regular assignment on the frequency, but specifically envisions a situation where two or more applicants are faced with a comparative hearing for regular authorization, and where public interest considerations warrant a conditional grant of one of them prior to completion of hearing. It is added that, under *Community,* [*Community Broadcasting Co., Inc.* v. *FCC,* 274 F. 2d 753, 19 RR 2047 (D.C. Cir. 1960)] conditional grants may be issued "only in circumstances which meet the Commission's own rules."
>
> 33. It is true that Oak Knoll to the extent that it has no permanent aspirations on the frequency, is beyond the specific comprehension of the rule. The request, however, is consistent with the policies underlying the rule, and the fact that it is not also within the exact wording thereof is no bar to a grant. In effect, the opposing parties are arguing that, unless the Commission has anticipated a particular proposal and established precise rules permitting its grant, the proposal must inevitably be denied. This view places too broad a construction upon the *Community* pronouncement quoted above, and overlooks that the situation, rather than the rules, is usually the first to arise. To hold that the Commission is without the power of positive action in situations not anticipated by its rules would be inconsistent with the dynamic nature of the broadcasting industry and its requests, and with the basic discretion and duties conferred and prescribed by the Communications Act.[28]

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[28] Cf., e.g., sections 4(i) and 303(g) and (r). "Underlying the (Communications Act) is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process posses [sic] sufficient flexibility to adjust itself to these

In this respect, we see no decisionally significant distinction between the *Oak Knoll* case, and the case now before us.[7]

8. Venture also notes that in two previous cases involving interim authorizations,[8] the Commission, after remand from the Court, petitioned the Court for clarification or enlargement of mandate as to whether applications for interim authority by nonapplicants for the regular authorization could be considered. In each case the Court denied the Commission's petition. However, we believe that the Court's directive in this case affords considerable discretion with respect to the establishment of an interim operator. Consequently, we invited applications for interim authorization, and explicitly invited non-applicants for a regular authorization, *Lamar Life Broadcasting Company,* 20 FCC 2d 635 (1969). Thus, we are of the view that applications such as CII's are within the discretion afforded by the Court's mandate, and conclude, therefore, that its application is properly before us for consideration.

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factors . . . (It) expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." ***FCC*** **v.** ***Pottsville Broadcasting Co.,*** 309 U.S. 134.

[7] In *Community* the Court stated that one criterion that must be met before an interim authorization can be granted is the need for the service. That question was discussed in *Oak Knoll.* The question need not be discussed extensively here since the Court has directed us to consider a plan for interim operation pending the completion of the comparative hearing, apparently having reached the conclusion that the need exists. Our finding that a need for continued service exists was stated in *Lamar Life Broadcasting Company,* 20 FCC 2d 635 (1969). Recent events in Jackson, specifically, the violence on the campus of Jackson State College, confirm that finding. Reducing the number of local television outlets in Jackson from two to one at this time would fly in the face of reason.

[8] ***Community First Corporation*** v. ***FCC,*** 403 F. 2d 578, 14 RR 2d 2019 (D.C. Cir. 1968); ***Consolidated Nine, Inc.*** v. ***FCC,*** 403 F. 2d 585, 14 RR 2d 2006 (D.C. Cir. 1968).

9. Venture, by letter dated May 8, 1970, alleges that there are certain interrelationships between CII and Civic. Lamar also raises that question. Venture's position is essentially that in view of those alleged interrelationships, CII, through Civic, should be viewed as an applicant for regular authorization, and that a grant of interim authority to one of several competing regular applicants would be prejudicial to the others. In support of its position, Venture alleges that CII is financially backed by the United Church of Christ (Church of Christ); that one of CII's pleadings was mailed from the Church of Christ; that Civic, despite an earlier interest in participating in an interim operation is no longer interested and supports CII's interim application, from which Venture concludes that it is not "inconceivable" that this change is due to common interests with CII;[9] and that CII and the Church of Christ are represented by the same counsel, who serves on CII's Board of Directors. Lamar notes that Dr. Aaron Henry joined the Church of Christ in opposing Lamar's renewal in 1964 and in the renewal hearings in 1967; that both were represented by the same counsel in those proceedings; and that Dr. Henry "is now a leading principal in Civic Communications Corporation." CII readily concedes its ties with the Church of Christ and notes that it has guaranteed a line of credit to CII[10] and provided other assistance. CII states, however, that it is a separate entity and is not con-

[9] Venture's full statement is as follows: "It is not inconceivable that Civic's sudden change in attitude has been prompted by its interest in and concurrence with the objectives of Communications Improvement, Inc., in tendering its filing for interim operation of the Channel 3 facilities."

[10] CII subsequently amended its application to change its financial plan. Under that plan, a loan from a new entity has been arranged and financial support from the Church [sic] of Christ will be terminated on the effective date of the grant of an interim authorization.

trolled by the Church of Christ. CII denies that it or its principals have any interests in Civic. Civic's letter of May 14, 1970, responds to Venture's allegations. There, Civic states that it has always preferred a non-applicant for interim authorization to be the interim operator, and still holds that preference, but that it has always maintained that it would participate in a joint interim if its preference does not prevail. Civic lists various occasions where it has made its position known to other applicants for regular authorization. Civic also states that there are no interrelationships between it and CII.

10. Both Civic and CII have stated that they have no interests in one another. We find nothing in their respective applications to indicate the contrary. The Church is not an applicant for a regular or interim authorization on channel 3, Jackson, and its stated interest in this proceeding is in support of CII. Those interests are not so great as to raise a question as to the real party in interest, and no allegations are made in that regard. Thus, Venture's allegations with respect to an interrelationship between CII and the Church of Christ are of no import here. Only Venture's statements as to a change of Civic's attitude with respect to the choice of an interim operator remains to support the interrelationship between CII and Civic based on Venture's allegations. Those allegations are entirely speculative.[11] Moreover, Civic states that it has always preferred a third-party interim operator and that its preference has not changed. Since a third-party interim operator would serve to expedite the comparative hearing,

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[11] Where several conclusions can be validly drawn from a premise or premises, we must require allegations of fact supporting the conclusion the petitioner wishes us to make. While Venture's position is not "inconceivable," it is also unsupported by facts which, if true, would establish that position.

Civic's preference is quite understandable.[12] As to Lamar's allegations, it can not be denied that Dr. Henry joined the Church of Christ in the 1964 and 1967 proceedings against Lamar, and that Dr. Henry is now a leading principal in Civic. Presumably, Lamar would have us conclude that Dr. Henry was then, and is now, a leading principal in the Church of Christ, but there are no allegations to support that conclusion. In the notice of appeal to the Court of Appeals for the District of Columbia Circuit in the prior proceedings, Dr. Henry is identified as a civil rights leader and is listed as a separate party. He is not identified as a member or leader of the Church of Christ. Civic, in which Dr. Henry is now a principal, is not represented by the same counsel that represents CII and the Church of Christ. Therefore, the only interrelationship that has been established by Lamar's allegations is that Dr. Henry and the Church of Christ were once represented by the same counsel in opposing the renewal of license of station WLBT. The minor significance of that relationship is left to speculation by Lamar and Venture. The fact of the matter is that the Church of Christ has opposed a pleading filed by Civic in the Court of Appeals for the District of Columbia Circuit. This adversary position is hardly the behavior expected of two entities with significant "interrelationships." We conclude that there is no basis for finding a

[12] For example, an interim authorization was granted to a corporation comprised of eight of the nine competing applicants for channel 13, Rochester, New York, on July 3, 1962, the competing applications for regular authorization having been designated for hearing on November 15, 1961. The profits of the operation were divided among the competing applicants that formed the interim corporation. The winning applicant did not begin operation of the station until March 1, 1970, almost eight years later, a considerably longer period than usual. It is clear, therefore, that such joint interims provide no incentive for an applicant who believes he can not win to drop out of the proceeding, or for any applicant to try to expedite the proceeding.

decisionally significant interrelationship between Civic and CII.

11. Venture's May 8, 1970, letter also raises a question with respect to Dr. Aaron Shirley, Vice-President and one of 16 directors of CII. Briefly, Venture alleges that Dr. Shirley, in his role as Chairman of the Mississippi Coalition to Save Headstart, filed a complaint with the Commission stating that station WLBT's coverage of a "Headstart Rally" was inadequate;[13] that a press release concerning the complaint was prepared by the Coalition the day prior to the rally; and that station WLBT, in response to the complaint, states that the rally was covered, so that a "conflict" exists as to what occurred. Venture concludes that this matter should be resolved prior to making a public interest finding with respect to CII. CII states in response that the date on the press release was in error and that it was not prepared until after the rally; that prior conversations with the station's staff indicated that the rally itself would not be covered; that the rally was not covered live, only subsequent events; and that Dr. Shirley saw only the first draft of th complaint, not its final form.

12. A review of Lamar's response to the complaint indicates that it did not cover the rally while in progress, but did interview participants after the rally and did cover subsequent events. The UPI reports submitted by station WLBT in its response confirm that account of the events. CII's telegram to the Commission is in terms of live coverage, so that the "conflict" raised by Venture is resolved. Moreover, while the press release is dated February 27, 1970, the body of the letter states that the rally took place

[13] The complaint was also directed against television broadcast station WJTV, channel 12, Jackson, Mississippi.

on "Saturday, February 27." Saturday actually fell on the 28th. The same error appears in the body of the telegram to the Commission. This obvious and repeated failure to match the date with the day of the week supports CII's contention that an error was made. An error in number, in our view, is much more probable than in day of the week, and we are persuaded that that was the case here. In any event, the issue date of the press release was given as February 28, 1970, so that even if it were prepared on the 27th, the opportunity remained for changes or corrections. Changes were, in fact, made and the allegation that the original press release might have been prepared prior to the rally is of no consequence. Thus, we are left with a complaint that a station did not give the kind of coverage to an event that its participants thought was adequate. Therefore, we are unable to find in the events described by Venture any qualification issues that should be raised as to CII.

13. Lamar is silent as to whether it would make its facilities available to CII and Venture. Nonetheless, both propose to lease the physical facilities now used by station WLBT. Each states that it will enter into good faith negotiations to determine the terms of a lease and that it is willing to enter into binding arbitration in the event that the parties can't reach an agreement. Thus, there is a degree of uncertainty as to the funds needed to operate the station for three months.[14] However, our financial standards are not absolute. Rather, we require only a reasonable assurance that sufficient funds will be available, *Ultravision Broadcasting Co.*, 1 FCC 2d 544, 5 RR

[14] Where stations with an established revenue history are involved, a three-month operating expense figure is used, *Orange Nine, Inc.*, 7 FCC 2d 788, 9 RR 2d 1157 (1967), rather that the one-year requirement specified in *Ultravision*.

2d 343 (1965). There are three factors that provide such reasonable assurances here. First, we note that in a previous television interim operation, a monthly rental of $25,000 was charged for the station's facilities, or $75,000 for three months. Second, each applicant has substantial funds available. And third, station WLBT shows a healthy revenue picture that we expect will substantially carry over to an interim operator. We conclude, therefore, that CII and Venture are financially qualified.

14. In addition to using the facilities now used by station WLBT, both CII and Venture indicate that they intend, insofar as is possible, to use the existing employees of the station for staffing the interim operation. Since that course of action would minimize job losses and the resultant disruption of personnel, we approve of that representation and would expect Venture and CII to abide by their undertaking, *Community First Corp.*, 15 FCC 2d 822, 15 RR 2d 358 (1969), *Consolidated Nine, Inc.*, 15 FCC 2d 825, 15 RR 2d 361 (1969). However, Lamar notes that its employees and studios are used jointly for its AM, FM, television and other non-broadcast activities. Lamar concludes that CII and Venture, because of this joint use, can not implement their proposals. We give this factor little weight. In any situation where an interim operator takes over operation of a station from a previous operator transitional difficulties will be expected. However, the use of the existing staff and facilities are the most expeditious means for easing a transition from one group to another, and provides the foundation for implementation of their program proposals. Present employees will presumably be offered jobs with the new interim operator, which they may accept or decline as they see fit. We would expect that those whose work is primarily with the radio stations or non-broadcast operations would choose to remain with

those activities. Lamar's conclusion to the contrary notwithstanding, an accommodation, in our view, can be reached as to physical facilities. We conclude that the difficulties raised by Lamar do not bar a grant of interim authorization to Venture or CII.

15. In view of the above, we find that each of the applicants for interim authority is legally, technically, financially and otherwise qualified to operate on channel 3, Jackson, on an interim basis. We turn, therefore, to the comparative aspects of their respective applications. We base our decision on the information contained in the applications and the related pleadings. We indicated that no oral argument or hearing would be held in selecting the interim operator in a prior decision, *Lamar Life Broadcasting Company,* 22 FCC 2d 47 (1970). Lamar states that it "reserves the right to challenge the legality of this procedure." However, we believe the information we have before us is sufficient to make our determination. Moreover, this proceeding has gone on for some time and there is a need for expedition. In this regard, we note that there is a stay of proceedings before the Court of Appeals awaiting the issuance of this decision. We believe, therefore, that the procedure we use is appropriate in the circumstances presented.

16. Based upon the information contained in the respective interim applications and the related pleadings, we have concluded that the public interest would be best served by a grant of CII's application. CII is not an applicant for regular authorization and its principals have no interests in any of the applicants for regular authorization.[15] Thus, its proposal avoids any possible prejudice

[15] It is stated, but without supporting affidavit, that Rev. Kenneth L. Dean, President of CII, in his position as Executive Di-

to the applicants whose mutually exclusive applications have been designated for hearing, and is in keeping with the principles enunciated in *Community Broadcasting Co., Inc.* v. *FCC*, 274 F. 2d 753, 19 RR 2047 (1960).[16] The lack of prejudice is of controlling comparative significance and outweighs all other comparative factors, see *Oak Knoll Broadcasting Corp.*, above. The Court did state that we had available the alternative of permitting Lamar to be

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rector of the Council on Human Relations in Jackson, has contacts with principals of each of the regular applicants. These are not, however, the sort of contacts that tend toward a unity of interest that would be created by financial, business or familial ties.

[16] The *Community* case essentially stands for the proposition that a grant of interim authority to one of several applicants for regular authorization has strong tendencies to be prejudicial. Such a grant, therefore, can only be countenanced where there are strong public interest considerations counterbalancing the potential prejudice. That construction and operation of a station during a comparative hearing " . . . may weigh in the balance of an otherwise close question is not a challenge to the good faith integrity of the triers; it is a recognition that they are mortal men," (footnote omitted) 274 F.2d at 759, 19 RR at 2052. The *Community* case arose in the situation where the interim operator would have committed substantial funds to construct a new facility. In our view, however, the possibility of prejudice is present where, as here, initial construction costs are not involved, *Oak Knoll*, above. The role of the incumbent and performance during the interim period can not be assumed to be free of potential prejudice. *Beloit Broadcasters, Inc.* v. *FCC*, 365 F. 2d 962, 7 RR 2d 2155 (1966), and other decisions cited by Venture involving an interim operation for the frequency utilized by radio station KWK, St. Louis, Missouri, should be distinguished for two reasons. First, we did not have an applicant there, such as CII here, for interim authority having no interest in obtaining a regular authorization. CII's presence affords us a choice with the least potential prejudice. And second, the joint interim corporation in the *Beloit* case was comprised of seven applicants for regular authorization. "The diffused composition of RTEI (the interim corporation) minimized the likelihood of significant prejudice to the ultimate disposition of the frequency resulting from an interim grant to it." 365 F. 2d at 963-4, 7 RR 2d at 2157. With only three certain applicants joining in the proposed joint interim operation here, the "diffusion" is significantly less.

the interim operator, if we found that the public interest would be served thereby. That statement could be construed to indicate that *Community* considerations would not be applied to this proceeding with respect to Lamar. However, we note that the Court did not discuss the *Community* case and may not have considered its applicability in this situation. The Court did state that Lamar is to be considered in the comparative hearing, " . . . on even terms as nearly may be, with any other applicant," *United Church of Christ* v. *FCC*, Case No. 19,409, Order denying rehearing, p. 2. The Court may well not have anticipated that a non-applicant for regular authorization would apply for interim authorization. Since we do have CII's application before us, and since its grant would place all applicants on an equal footing in the comparative hearing, no possibility of prejudice to the outcome of the hearing is presented and the public interest is, therefore, better served. Accordingly, we believe that our decision is consistent with the Court's mandate in the present case and the *Community* decision.

17. Joint interim operations, in our experience, see footnote 12, above, raise problems by their very nature. Operation of the station is left in the hands of adversary groups resulting in poorer management and a nebulous locus of responsibility. They also tend to prolong the proceedings. Thus, there is further reason for preferring CII over Venture.

18. With respect to net profits, CII states:

> If interim authority is granted, Improvement (CII) will donate the entire net profits of operation to non-profit organizations engaged in activities relating to broadcasting, primarily in Mississippi. Plans include the donation of about one half of the net profits to

> finance the development of educational television in the State of Mississippi. The allocation of funds for this purpose will be arrived at in consultation with the organizations engaged in planning and operating non-commercial educational facilities in the State. Improvement will also seek to develop and support a communications training facility at a predominantly Negro college, preferably in Mississippi. Improvement intends to administer its grant program in such manner as to avoid any influence or control over the program content or staffing of either the educational television stations or the educational institution.

We also note that CII's officers and directors will not be remunerated for their services in their respective capacities. We generally approve of CII's plans. However, the channel is assigned to Mississippi, and its revenues are derived primarily for the service it provides to the residents of the state. Therefore, we believe that the net profits should be distributed in Mississippi. There are operating Mississippi educational broadcast stations, and several universities and colleges where a communications training facility can be developed, so that such a requirement imposes no unduly restrictive limitation. The grant of CII's authorization will, therefore, be conditioned accordingly. So that we can review CII's disposition of profits, and its conformity with this condition and its own representations, we shall require CII to submit, on a semiannual basis, a balance sheet, a revenue statement, and a statement as to the disposition of net profits.

19. We have proceeded on the assumption that Lamar will make its facilities available to an interim operator on a reasonable basis. Since Lamar is a corporation and has an obligation to its shareholders, we have every reason to believe that it would not permit its television facilities to

lie fallow. We will take whatever further action is warranted if Lamar does not make its facilities available or demands unreasonable terms. To permit time to negotiate those terms, we will make the effective date of the grant of CII's application at 3:00 a.m., thirty days from the release of this Order. At the same time, we will terminate Lamar's temporary authorization.

20. Accordingly, IT IS ORDERED that the application (BPCTI-9) of Channel 3 of Jackson, A Joint Venture, and the application (BPCTI-10) and petition to continue operation of Lamar Life Broadcasting Company ARE DENIED.

21. IT IS FURTHER ORDERED that the application of Communications Improvement, Inc., (BPCTI-11) IS GRANTED in accordance with specifications to be issued, subject to the following conditions:

A. That Communications Improvement, Inc., shall submit on a semiannual basis, a balance sheet, a revenue statement, and a statement as to the disposition of net profits.

B. That net profits shall be distributed within the State of Mississippi, as provided in paragraph 18, above.

22. IT IS FURTHER ORDERED that the grant of Communications Improvement, Inc.'s application IS EFFECTIVE at 3:00 a.m., thirty (30) days from the release of this Order, and concurrently, Lamar Life Broadcasting Company's temporary authorization IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION*

Ben F. Waple
Secretary

* See attached Concurring Statement of Chairman Burch.

CONCURRING STATEMENT OF CHAIRMAN BURCH

While I join in this decision, I believe it appropriate to set forth briefly my reasons for doing so. I find this a difficult case. There are substantial considerations militating for a different course. However, we do not write on a clean slate here. This case, above all other Commission cases, is controlled, I believe, by past Court decisions. My present action is thus dictated by the past.

First, the background of the matter: In its June 20, 1969 decision in *Office of Communication of the United Church of Christ* v. *F.C.C.*, —— U.S. App. D.C. ——, 425 F. 2d 543, the Court of Appeals held that the Commission's previous conclusion that the present license should be renewed was not supported by substantial evidence. It directed that the Commission forthwith vacate its grant of a renewal of license to Lamar and invite new applications for the license. The Court further held that because the Commission had "botched" the hearing, Lamar also should be permitted to compete in the new hearing to be held. In a concluding paragraph, the Court stated that the Commission could permit Lamar to carry on an interim operation if it found that to be in the public interest, and left to the Commission's discretion the question of the interim operation.[1]

The Commission sought reconsideration, stressing the statutory scheme and particularly the applicability of Section 307(d) (i.e., that there must be a determination as to whether a renewal application should be granted; that if that determination is adverse to Lamar, it must cease

[1] While at first blush there would thus appear to be considerable discretion vested in the Commission as to its action in this area, analysis establishes that this is not the case. Rather, in a situation where there are competing applications, including for the interim operation, past Court precedents do dictate the result. See ensuing discussion.

operation and cannot compete in any new hearing for Channel 3; and that if the determination is favorable to Lamar or not yet definitively made, Lamar is entitled, under Section 307(d), to continue operating during any hearing on competing applications). The Court denied rehearing on September 5, 1969. In its statement accompanying the order denying rehearing, the Court stated its intention that Lamar should compete for the new license "on even terms as nearly as may be, with any other applicant," and that, as to the Section 307(d) argument, Lamar was at best, "a licensee in name only, and it is presumably in such light that the licensee here involved will take its place among competing applicants." (425 F. 2d 543, 551.)

This, then, is the pertinent background against which we must evaluate the three pending interim proposals (i.e., Lamar; Jackson, A Joint Venture; Communications Improvement, Inc.). As between the latter two, I think the public interest is better served by the grant of Communications Improvement, Inc., for the reasons noted in *Florida-Georgia Television Co., Inc.*, 9 FCC 2d 235, 239 (1967). The more difficult issue is whether to disrupt the existing operation at all, during the pendency of the hearing. The substitution of any new interim operator will be disruptive to some significant extent; the disadvantages of such disruption could well be compounded here where there is a joint TV-aural broadcasting operation, housed in a single unit.[2]

However, the issue is one which must be resolved based on what the public interest standard calls for in these unusual circumstances, and, as stated, pertinent Court decisions do compel a particular answer. The Court has

[2] As an incidental point, I would stress that whether Lamar or Joint Venture were given the interim authorization, the profits should in any event not be available to the interim operator (or operators) but rather be given to local educational TV entities.

stressed that Lamar is at best "a licensee in name only" and should compete for the new license "on even terms as nearly as may be . . . " In closely analogous situations, the Court has further made clear what the above prescription entails. The situation before us appears to me, now that we have additional applicants, to be governed by *Consolidated Nine, Inc.* v. *F.C.C.,* 131 U.S. App. D.C. 179, 403 F. 2d 585 (C.A.D.C., 1968), and *Community First Corporation* v. *F.C.C.,* 131 U.S. App. D.C. 172, 403 F. 2d 578 (C.A.D.C. 1968). In each of these cases a license grant was set aside even though the license holder was not found disqualified, the Commission was directed to accept new applications, and in the new proceedings the existing operator was to "compete . . . on a completely equal and in no sense a preferred basis . . . " (*Jacksonville Broadcasting Corp.* v. *F.C.C.,* 121 U.S. App. D.C. 69, 75, 348 F. 2d 75, 81, certiorari denied, 382 U.S. 893 (1965). In each case, the Court, expanding upon its ruling in *Community Broadcasting Co., Inc.* v. *F.C.C.,* 107 U.S. App. D.C. 95, 274 F. 2d 753 (C.A.D.C., 1960), held that it was an abuse of discretion for the Commission to authorize an interim operation to be conducted solely by the party whose license had been vacated. In view of these cases and the Court's clear directive that Lamar, "a licensee in name only," compete on even terms with other applicants, I believe that our course is mandated. I accordingly join in the majority's disposition of the matter.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,613—September Term, 1970

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION.

CIVIC COMMUNICATIONS CORPORATION, JACKSON TELEVISION, INC., DIXIE NATIONAL BROADCASTING CORPORATION, COMMUNICATIONS IMPROVEMENT, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

ORDER

On consideration of the motion of appellant Lamar Life Broadcasting Company for stay pending appeal, and of the responsive pleadings filed with respect thereto, for immediate decision on the merits or, alternatively, for certification of the issue to the Supreme Court of the United States and on consideration of the motion of appellant Lamar Life Broadcasting Company to consolidate the above entitled case with numbers 23,921 and 23,953, it is

ORDERED by the Court that appellant's motion for immediate decision on the merits is granted and the order of the Federal Communications Commission, appealed from herein, is hereby affirmed, and it is

FURTHER ORDERED by the Court that the remaining motions filed in the above entitled case are dismissed as moot.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 17 1971
Nathan J. Paulson
CLERK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,409

Decided June 20, 1969

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, AARON HENRY, ROBERT L. T. SMITH, and UNITED CHURCH OF CHRIST AT TOUGALOO,

Appellants,

—v.—

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

LAMAR LIFE BROADCASTING COMPANY,

Intervenor.

ON PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION SUBSEQUENT TO REMAND

Mr. Earle K. Moore, with whom *Mr. Henry F. Lerch* and *Mrs. Ann Aldrich* were on the brief, for appellants.

Mr. Stuart F. Feldstein, Counsel, Federal Communications Commission, with whom *Messrs. Henry Geller,* General Counsel, and *John H. Conlin,* Associate General Counsel, Federal Communications Commission, were on the brief, for appellee. *Mr. Howard J. Braun,* Counsel, Federal Communications Commission at the time the record was filed, also entered an appearance for appellee.

Mr. Paul A. Porter, with whom *Mr. Reed Miller* was on the brief, for intervenor.

Messrs. Peter L. Koff and *Lawrence Speiser* filed a brief on behalf of American Civil Liberties Union as *amicus curiae* urging reversal.

Before BURGER, McGOWAN and TAMM, *Circuit Judges.*

BURGER, *Circuit Judge*: This case returns to the Court again after hearings held pursuant to an earlier opinion of this Court in which we directed that intervenors representing segments of the licensee's listening public were to be permitted to intervene and participate.[1] No additional intervenors thereafter sought to take part in the Commission proceedings.[2]

The action of this Court in remanding for hearings with listening-public intervenors taking part followed the Commission's 1965 action which granted the licensee a "probationary" one year license.[3] This unusual Commission action underscored that in the proceedings involving the application for a three-year renewal (from 1964 to 1967) the Commission had not been able to conclude that the licensee met the burden of showing that renewal of its license for three years was in the public interest.

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[1] Office of Communication of the United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966).

[2] The fact that no additional intervenors brought their case to the Commission substantiates our earlier observation that:

> The fears of regulatory agencies that their process will be inundated by expansion of standing criteria are rarely borne out. Always a restraining factor is the expense of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the cost burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases.

Church of Christ, *supra* note 1 at 340, 359 F.2d at 1006.

[3] Lamar Life Broadcasting Co., 38 F.C.C. 1143 (1965).

Following various complaints filed with it, in 1962 the Commission had initiated its own field investigation into the programing operations of certain Mississippi broadcast stations, including WLBT. This investigation precipitated a July 25, 1963, letter from the Commission requesting the licensee's comments on listed questions as to its programing policies and set forth some of the specific findings of the field investigation on these matters. The Commission's consideration of WLBT's reply was pending when the licensee filed an application for renewal of its license for the June 1, 1964 to June 1, 1967 period.

In reviewing these responses prior to its award of the one-year probationary grant, the Commission noted, *inter alia:*

> The question is rather whether the licensee complied with the requirements of the fairness doctrine—i.e., whether, having presented one side of a controversial issue of public importance, it sought affirmatively to encourage and implement the presentation of contrasting viewpoints. *The licensee's response is not fully satisfactory in this respect.*
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> * * *
>
> In short, when a fairness complaint is made, a licensee relying upon network programs to balance local broadcasts has the burden of demonstrating that the network shows carried by it did present contrasting viewpoints to those expressed in the local broadcasts. *That showing has not been made here.*

Lamar Life Broadcasting Co., supra note 3 at 1146, 1147-48 (emphasis added).

Moreover, in setting forth the specific conditions attached to its one-year probationary award, the Commission provided:

> (iv) *That the licensee immediately cease discriminatory programing patterns.* Thus, it is up to the licensee to make the programing judgment whether or not to have a daily 1-minute devotional program at noon, in which appearances are rotated among the area churches in the area on the basis of race. Such a practice is obviously inconsistent with the public interest; indeed, we note that the licensee does not try to defend it.

Id. at 1154 (emphasis added).

In discussing the Commission's action we noted that the Commission had found that the licensee's prior conduct prevented the grant of a full term license.[4]

When the matter was again before the Commission on our remand, therefore, it was in a posture that the licensee had yet to demonstrate that it was in the public interest for the license to be renewed. This was a less favorable posture for the licensee than would have been the case absent the "probationary license" grant. This is important, but its significance seems to have eluded the hearing Examiner and the Commission as well; we emphasize this now to remove any lingering doubts as to our evaluation of a "probationary" grant—a grant which by its nature assumes that the renewal-licensee has been unable to persuade the Commission that it is presently in the public interest to

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[4] At that time we observed:

> The Commission in this Court argues that it accepted all Appellant's allegations of WLBT's misconduct and that for this reason no hearing was necessary. Yet the Commission recognized that WLBT's past behavior, as described by Appellants, would preclude the statutory finding of public interest necessary for license renewal; hence its grant of the one-year license on the policy ground that there was an urgent need at the time for a properly run station in Jackson must have been predicated on a belief that the need was so great as to warrant the risk that WLBT might continue its improper conduct.

Church of Christ, *supra* note 1 at 341, 359 F.2d at 1007.

grant a three-year renewal. That the Examiner failed to grasp this fact is reflected throughout his report and noticeably in his statement that

> "the evidentiary hearing . . . presented [Appellants] ample and sufficient opportunity to come forward and *sustain their serious allegations* that they had made against the applicant. They have woefully failed to do so . . ."

Lamar Life Broadcasting Co., 14 F.C.C.2d 495, 549 (1967) (emphasis added).

Since the Commission itself had previously found that some of these "serious allegations" were sufficient to withhold the grant of the traditional three-year license, the Examiner's approach, and its subsequent adoption by the Commission, signifies an attitude considerably at odds with the Commission's earlier action in refusing a three-year license. The Examiner seems to have regarded Appellants as "plaintiffs" and the licensee as "defendant," with burdens of proof allocated accordingly. This tack, though possibly fostered by the Commission's own action,[5] was

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[5] In setting the hearing following our remand, the Commission, on May 26, 1966, designated the hearing issues to be:

> (a) Whether station WLBT has afforded reasonable opportunity for the discussion of conflicting views on issues of public importance;
>
> (b) Whether station WLBT has afforded reasonable opportunity for the use of its broadcasting facilities by the significant groups comprising the community of its service area;
>
> (c) Whether station WLBT has acted in good faith with respect to the presentation of programs dealing with the issue of racial discrimination, and, particularly, whether it has misrepresented to the public or the Commission with respect to the presentation of such programing.
>
> (d) Whether in light of all the evidence a grant of the application for renewal of license of Station WLBT would serve the public interest, convenience, or necessity.

In the designation Order, the Commission explained:

> 10. Pursuant to the rule announced in *D & E Broadcasting Company*, 1 FCC 2d 78 (1965), and in accordance with the

a grave misreading of our holding on this question.[6] We did not intend that intervenors representing a public interest be treated as interlopers. Rather, if analogues can be useful, a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.

This was all the more true here because prior to the efforts of the actively participating intervenors, the Com-

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> statutory mandate of Section 309(e), the burden of proof as to issues (a) and (b) shall be upon the intervenors, the burden of proof as to issue (c) shall be upon the Broadcast Bureau, and the burden of proof as to issue (d) shall be upon the applicant.

Lamar Life Broadcasting Co., 3 F.C.C. 2d 784 (1966).

[6] Prior to the initiation of the evidentiary hearing we denied Appellants' motion for clarification of our earlier opinion; however, in a memorandum statement accompanying the denial we noted:

> In our view it should not be necessary, and certainly is not desirable, for this court to supervise the details of conduct of hearings before the Commission by the device of periodic revision of the language used in opinions. Only the most extraordinary circumstances would warrant our intervention by this means; such circumstances do not exist here inasmuch as, in respect of paragraphs 9 and 10, respectively, of the Commission's order released May 25, 1966, *we assume that* (1) the Commission's concept of evidence of past performance which, in its words, "is not unduly remote in time" is commensurate with what was, in our words, "a history of programming misconduct of the kind alleged" occasioning our remand, and (2) *the Commission's reference to "the burden of proof" in respect of issues (a), (b), and (c) is intended to mean only the burden of going forward with evidence in the first instance.*

Church of Christ, No. 19,409 (D.C. Cir., Filed November 18, 1966) (emphasis added).

mission itself had long since found the licensee wanting.[7] It was not the correct role of the Examiner or the Commission to sit back and simply provide a forum for the intervenors; the Commission's duties did not end by allowing Appellants to intervene; its duties began at that stage.

A curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct of the evidentiary hearing. An example of this is found in his reaction to evidence of a monitoring study conducted by Appellants for about one week in 1964 and which was the subject of two days of testimony at the hearing. The Examiner's conclusion was that the play-back had "virtually no meaning for the simple reason that it was not . . . fair and equitable. [It] is worthless and therefore *completely discounted* for any consideration by the hearing examiner." 14 F.C.C.2d at 543 (emphasis added). In context or out, this reaction is difficult to comprehend.[8] The Commission has often com-

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[7] In connection with WLBT's 1959 renewal applications, the Commission had found specific failures to comply with the demands of the Fairness Doctrine, but did not withhold a renewal on the grounds that they were "isolated violations." *See* Lamar Life Broadcasting Co., *supra* note 3 at 1145.

[8] The following excerpts from the hearing transcript illustrate the licensee's success in placing an unrealistic burden on the Intervenors. Mrs. Elizabeth Ewing, who prepared the monitoring study exhibits on behalf of Appellants was the witness:

> Q. Could you tell from the tape whether the news of, well say, Dick Sanders, whether he was reading from United Press International wirecopy? Do you know what that is?
> A. Yes.
> Q. Could you tell whether he was reading from UPI wirecopy or from a transcript that he, himself, had prepared?
> A. No.
> Q. Did you make any identifications where the source of information was coming from?
> A. No.
>
> • • •
>
> Q. Have you ever lived in Jackson, Mississippi?
> A. No, I have not.

(*continued on following page*)

plained—and no doubt justifiably so—that it cannot monitor licensees in any meaningful way; here a 7-day monitoring, made at no public expense, was presented by a public interest intervenor and was dismissed as "worthless" by the Commission.

Concerning the cutting off of a network program relied on by Intervenors as showing violations of the Fairness Doctrine the Examiner found: "There is not one iota of evidence in the record that supports any such allegation." Yet in the transcript of proceedings we find testimony identifying the program which was admittedly cut off. The record shows the following:

Q. Did you receive any instructions as to what would be of interest to the people in Jackson, Mississippi?

A. No.

Q. Did you study any documents or books or papers to find out what would be of interest to the people in Jackson, Mississippi?

A. No.

Q. Did you read Jackson newspapers during this period in March 1964?

A. No.

* * *

Q. Do you know whether or not Dick Sanders was quoting a press release from the Department of Justice?

A. No.

Q. Do you know whether he was quoting directly from the wire service?

A. No, I don't.

Joint Appendix 172, 183-84, 187 [hereinafter J.A.].

This witness had already produced evidence of the contents of the monitored broadcasts, yet she was pursued to ascertain the *source* of these programs—the type of information particularly in the control and at the disposal of a broadcast licensee. In evaluating Mrs. Ewing's testimony, the Examiner pursued the same tack, discrediting the study and the testimonial evidence to support it without ever placing on the licensee the affirmative burden of producing evidence to establish either the true source of the programing materials or, as compared to that of Mrs. Ewing, its own sensitivity to the needs and interests of portions of its listening audience.

Q. Did you recognize the lunch counter?

A. I recognized the Woolworth Counter where the demonstration occurred here and the picture immediately disappeared. I picked up the telephone and immediately called WLBT—

Q. With whom did you speak?

A. The man refused to identify himself. I did not identify myself. I said, "Did you cut that off because that showed those Negroes sitting in at Woolworth's in Jackson?" *The man said, "Yes."*

Mr. George: *I object.* I may be anticipating but I will object to any statement as to the reply.

Presiding Examiner: *That is correct. We will sustain that portion of it. You can't quote some undisclosed person.*

The portion of the answer is stricken where he was quoting some unidentified person which is sheer hearsay.[9]

J.A. 720-21 (emphasis added).

On allegations that at least two of the licensee's commentators used disparaging terms with reference to Negroes there was testimony of listeners who said they heard these episodes; in his initial decision the Examiner noted that "[a]t least three of the [Appellants'] witnesses" so testified. Nevertheless, the Examiner chose to belittle this evidence:

> Because of the conflicting testimony respecting Ellis [one of WLBT's commentators], there is no finding made as whether he did or did not use the word "nigger" or "negra". But the evidence is undisputed that Alon Bee did use the expressions "negra" or "nigger" at some indefinite time in the past while

[9] Conceivably a licensee might be justified, in some circumstances, to decline to carry a program it regarded as inflammatory because of current tensions; if placed on that basis and reasonable exercise of such discretion presumably would be sustained by the Commission.

> broadcasting over station WLBT. *A glaring weakness of the intervenors' evidence here is that, as in many of their allegations, they did not pinpoint specific times when certain events supposedly occurred, thereby unfairly depriving the applicant of an opportunity properly to rebut such allegations.*

14 F.C.C.2d at 510 (emphasis added).

It is not our function to determine whether this would have supported a finding that the licensee had violated the Fairness Doctrine but the Examiner's erroneous concept of the burden of proof shows a failure to grasp the distinction between "allegations" and testimonial evidence, and prevented the development of a satisfactory record.

The infinite potential of broadcasting to influence American life renders somewhat irrelevant the semantics of whether broadcasting is or is not to be described as a public utility. By whatever name or classification, broadcasters are temporary permittees—fiduciaries—of a great public resource and they must meet the highest standards which are embraced in the public interest concept. The Fairness Doctrine plays a very large role in assuring that the public resource granted to licensees at no cost will be used in the public interest. In short, we do not determine how the factors we have discussed should have been weighed by the Commission but only that they had some probative value and should have been considered. To borrow a phrase from the Examiner, his response manifests a "glaring weakness" in his grasp of the function and purpose of the hearing and the public duties of the Commission.

We need not continue recitals from the record or examples of similar situations which shed light on the nature of the hearings; in our view the entire hearing was permeated by similar treatment of the efforts of the intervenors, and the pervasive impatience—if not hostility—of the Examiner

is a constant factor which made fair and impartial consideration impossible. The Commission and the Examiners have an affirmative duty to assist in the development of a meaningful record which can serve as the basis for the evaluation of the licensee's performance of his duty to serve the public interest. The Public Intervenors, who were performing a public service under a mandate of this court, were entitled to a more hospitable reception in the performance of that function. As we view the record the Examiner tended to impede the exploration of the very issues which we would reasonably expect the Commission itself would have initiated; an ally was regard as an opponent.

The Commission, except as modified on some minor points, adopted the Examiner's Initial Decision: "[W]e are in agreement with the examiner's conclusions that the intervenors failed to corroborate or substantiate virtually all of their allegations upon which the hearing was predicated . . . ." *Lamar Life Broadcasting Co.*, 14 F.C.C.2d 431, 433 (1968). In a footnote to this resolution, the Commission notes:

> 8. Since our decision is based on the preponderance of evidence adduced at the hearing, we are of the opinion that the intervenors' argument that they only had the burden of going forward with evidence in the first instance on hearing issues (a) and (b), that the Broadcast Bureau only had the burden of going forward on issue (c), and that the station had the actual burden of proof on those issues, is mooted.

In this respect, we think it important to set forth what the trial Examiner understood the burdens of proof to be, for his understanding on this point profoundly affected his crediting or dismissing what was in essence *testimonial evidence* although he constantly characterized the evidence as "allegations":

> Mr. Moore [Counsel for appellants]: . . . I just want to state for the record that as I understand the burden of proof, the burden of proof on all issues is on the station and the only burden on the applicant [sic; should be intervenors] and the Bureau is the burden of going forward.
>
> That is my understanding of the interpretation which has been placed on the Commission's order by the Court of Appeals.
>
> Presiding Examiner: No, that is not my interpretation. My interpretation is, by the Commission action, is *that the burden of proof is primarily upon the intervenors* on issues A and B, on the Broadcast Bureau on C and on the applicant on D, and you can't by waving the magic wand, shift the burden of proof to this applicant or to the Bureau.

J.A. 304-05 (emphasis added).

That this concept of the allocation of the burden of proof permeated the Commission's final resolution can be seen in its constant references to the Public Intervenor's failure to "prove" its "charges". As the Commission noted in closing: "We only conclude that the intervenors have failed to prove their charges and that the preponderance of the evidence before us establishes that WLBT has afforded reasonable opportunity for the use of its facilities by the significant community groups comprising its service area." 14 F.C.C.2d at 437-38. Once again we see the pervasiveness of the original error in confusing mere "allegations" and testimonial evidence—evidence which if not contradicted by the licensee's evidence, or on its face incredible, was entitled to carry the day in terms of establishing the point to which it was directed.

The Examiner and the Commission appear to have overlooked the 1965 Memorandum Opinion and Order of the Commission which contains much to the contrary to its

present position;[10] moreover, the practical effect of the Commission's action was to place on the Public Intervenors the entire burden of showing that the licensee was not qualified to be granted a renewal. The Examiner and the Commission exhibited at best a reluctant tolerance of this court's mandate[11] and at worst a profound hostility to the participation of the Public Intervenors and their efforts.[12]

The record now before us leaves us with a profound concern over the entire handling of this case following the remand to the Commission. The impatience with the Public Intervenors, the hostility toward their efforts to satisfy a surprisingly strict standard of proof, plain errors in rul-

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[10] *See* note 4 *supra.*

[11] *See* note 6 *supra.*

[12] Two members of the Commission seemed to read the record much as we read it now. In a further statement filed by Commissioners Cox and Johnson in response to the majority's "further statement" in response to the original dissent, the dissenting Commissioners noted:

> We remain perplexed by our colleagues' interpretation of the burden of proof issue, notwithstanding their attempt to further elucidate this problem in the further statement. As we noted in our dissenting opinion, the court of appeals clearly expressed its expectation that the Commission would resolve the problem by placing upon petitioners [Public Interest Intervenors] "only the burden of going forward with evidence in the first instance." By the strictures of the Communications Act of 1934, it is the licensee who is obligated to prove that renewal of his license is in the public interest, convenience, or necessity.
>
> Our colleagues maintain that, "neither the burden of going forward with the evidence nor the burden of nonpersuasion [is] * * * discharged by the party on whom it may fall by the simple making of charges and/or allegations." Needless to say, we have not suggested that "simple charges and/or allegations" are adequate. However, under their construction, it almost seems that presumptions favoring the licensee arise as to each of the issues contained in the pleadings; and, thus, as to the ultimate issue of public interest. This rule of procedure is plainly unjust and flatly contradictory of the court's memorandum respecting the burden of proof questions, a fact noted in our dissent and not disputed by the further statement.

Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 487 (1968).

ings and findings lead us, albeit reluctantly, to the conclusion that it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions and its own Decision and Order under a correct allocation of the burden of proof. The administrative conduct reflected in this record is beyond repair.

The Commission itself, with more specific documentation of the licensee's shortcomings than it had in 1965 has now found virtues in the licensee which it was unable to perceive in 1965 and now finds the grant of a full three-year license to be in the public interest.

We are compelled to hold, on the whole record, that the Commission's conclusion is not supported by substantial evidence. For this reason the grant of a license must be vacated forthwith and the Commission is directed to invite applications to be filed for the license. We do refrain, however, from holding that the licensee be declared disqualified from filing a new application; the conduct of the hearing was not primarily the licensee's responsibility, although as the applicant it had the burden of proof. Moreover, the Commission necessarily did not address itself to the precise question of WLBT's qualifications to be an applicant in the new proceeding now ordered, and we hesitate to pass on this subject not considered by the Commission.

The Commission is directed to consider a plan for interim operation pending completion of its hearings; if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earnings of the licensee should be impounded by the Commission pending final disposition of this license application.[13]

Reversed and remanded for further proceedings in accordance with this opinion.

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[13] We are aware that in the ordinary course the license granted by the Commission would expire on June 1, 1970.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,409

OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, AARON HENRY, ROBERT L. T. SMITH, and UNITED CHURCH OF CHRIST AT TOUGALOO,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

LAMAR LIFE BROADCASTING COMPANY,

Intervenor.

ON PETITIONS FOR REHEARING OR CLARIFICATION AND SUGGESTIONS FOR REHEARING *en banc*

Dated September 5, 1969

Mr. Henry F. Lerch and *Mrs. Ann Aldrich* were on the pleadings, for appellants.

Messrs. Henry Geller, General Counsel and *John H. Conlin,* Associate General Counsel, Federal Communications Commission, were on the pleadings, for appellee. *Messrs. Howard J. Braun,* Counsel, at the time the record was filed, and *Stuart F. Feldstein,* Counsel, Federal Communications Commission, also entered appearances for appellee.

Messrs. Paul A. Porter, Reed Miller, Dennis G. Lyons, and *Robert D. Rosenbaum* were on the pleadings, for intervenor.

Before BAZELON, *Chief Judge,* and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON and ROBB, *Circuit Judges,* in Chambers.

ORDER

On consideration of the petitions filed herein by counsel for the Federal Communications Commission and intervenor, Lamar Life Broadcasting Company, for rehearing, for clarification of the Court's opinion and of the suggestions for rehearing *en banc,* it is

ORDERED by the Court, insofar as the aforesaid petitions are directed to the assigned division of this Court, that said petitions be denied, and it is

FURTHER ORDERED by the Court *en banc,* there not being a majority of the judges of this circuit in favor of having this case reheard by the Court sitting *en banc* that the suggestions for *en banc* hearing are denied.

Per Curiam.

STATEMENT OF JUDGES MCGOWAN AND TAMM ACCOMPANYING VOTE TO DENY THE PETITION OF THE FEDERAL COMMUNICATIONS COMMISSION FOR REHEARING BY THE PANEL OR EN BANC.

The essential conclusion of the division which heard this case was that the record compiled upon remand was, because of the misconceptions of the Trial Examiner, in no state to admit of an informed and reliable finding as to whether the renewal sought was in the public interest. Since

the licensee has not in over six years established its right to continue to be entrusted with this valuable public asset, the opinion understandably expressed some impatience with this state of affairs, although it recognized that the ineptitude of the Commission was as much, if not more, to blame for this scandalous delay than was the licensee. For this reason, the division was not disposed to declare the licensee ineligible to seek new authority to use the channel. It did think that the licensee should compete for that authority, on even terms as nearly as may be, with any other applicant.

The Commission professes concern that the court has improperly arrogated to itself a decision which assertedly is committed only to the Commission, namely, the denial of the license renewal application because the licensee is not qualified under any circumstances, in terms of the public interest, to have the channel. Had that been the division's purpose, it would not have contemplated that the licensee could be one of the competing applicants. What was held was that the proceedings on remand had been hopelessly bungled and that the public interest was best served by taking note of the early expiration date* and getting on with a new hearing in which the Commission can decide who is best qualified to have this channel. The Commission knows full well how to do this under its existing powers, without interruption of the present service if that is deemed important and on such terms as it thinks fit.

The Commission points to the provision of 47 U.S.C. § 307(d) to the effect that, pending final disposition of a renewal application, the Commission "shall continue such

* The license grant under review terminates June 1, 1970, and proceedings to determine who should be the licensee for the term beginning on that date would have to get under way in ample time before that.

license in effect." It says that this means that the licensee seeking renewal must be regarded as having continuing authority until its application has been finally disposed of adversely to it—and this last, so it is said, only the Commission can do. It is doubtful if Congress intended that a licensee should be able to remain in possession indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny. A licensee holding over on any such basis is, at best, a licensee in name only, and it is presumably in such light that the licensee here involved will take its place among competing applicants.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON, D. C. 20001

April 29, 1971

No. 24,613—*Lamar Life Broadcasting Co.* v. *FCC*

David H. Lloyd, Esq.
1229—19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Lloyd:

Enclosed is a copy of the order denying your petition for rehearing. Your suggestion that this case be reheard by the Court *en banc* was transmitted to the full Court.

The purpose of this letter is to inform you that there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc,* it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

NJP/bja
Enc.

cc: RICHARD WILEY, Esq.
MARTIN E. FIRESTONE, Esq.
EARLE K. MOORE, Esq.
WILLIAM H. BORGHESANI, JR., Esq.
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WILLIAM P. BERNTON, Esq.
THOMAS H. WALL, Esq.
FORBES BLAIR, Esq.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 24,613

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION.

CIVIC COMMUNICATIONS CORPORATION, JACKSON TELEVISION, INC., DIXIE NATIONAL BROADCASTING CORPORATION, COMMUNICATIONS IMPROVEMENT, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court.

/s/ NATHAN J. PAULSON
NATHAN J. PAULSON
Clerk

United States Court of Appeals
for the District of Columbia Circuit
FILED APR 30 1971
Nathan J. Paulson
CLERK

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,613

September Term, 1970

United States Court of Appeals
for the District of Columbia Circuit
FILED MAY 14 1971
Nathan J. Paulson
CLERK

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION.

CIVIC COMMUNICATIONS CORPORATION, JACKSON TELEVISION, INC., DIXIE NATIONAL BROADCASTING CORPORATION, COMMUNICATIONS IMPROVEMENT, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

ORDER

On consideration of appellant's motion to stay mandate, and of the responsive pleadings filed with respect thereto, it is

ORDERED by the Court that the motion be granted and the Clerk is directed to stay the issuance of the mandate in the above entitled case to and including May 30, 1971. Said stay to be subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Per Curiam

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JUN 10 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC., CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORP., JACKSON TELEVISION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC., CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORP., JACKSON TELEVISION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

STATEMENT

This Supplemental Brief is submitted by Petitioner, Lamar Life Broadcasting Company, (hereinafter "Lamar"), pursuant to the authority of Rule 24(5) of this Court. Its purpose is to bring to the Court's attention a Memorandum Opinion and Order of the Respondent, Federal Communications Commission, (hereinafter "Commission"), released on May 21, 1971, three days after the filing of the Petition for a Writ of Certiorari herein, which purports to enforce the prior Orders of the Commission here on review even though the mandate of the Court of Appeals in this cause has been stayed pending

certiorari. For the reasons to follow, it is respectfully requested that this Court's review on certiorari include review of the Commission's Order of May 21, 1971.

As was detailed in Lamar's Petition for Writ of Certiorari, (Statement, pp. 3-7), the Commission's Order of September 8, 1970, here under review, directed Lamar to cease operating its television station, WLBT (TV), Jackson, Mississippi, and granted interim operating authority to Respondent, Communications Improvement, Inc., (hereinafter "CII"), pending a comparative hearing now underway at the Commission to choose a permanent licensee. The effectiveness of said Order was stayed by the Commission until thirty (30) days after the Court of Appeals acted upon Lamar's motion for stay pending appeal in that Court.

The Court of Appeals deferred action on Lamar's motion for stay until it acted on the merits of the appeal on March 17, 1971, at which time it also dismissed the stay motion as moot. The effectiveness of the Commission's Order of September 8, 1970, was thus stayed until action by the Court on the merits of the appeal, thereby preserving the *status quo*. Following the filing by Lamar of a Petition for Rehearing and Suggestion for Rehearing En Banc, which automatically stayed the Court's mandate until seven (7) days after denial of said Petition by the Court (Rule 40, Federal Rules of Appellate Procedure), Lamar filed a timely motion for stay of the mandate of the Court below, pending action by this Court on a petition for a writ of certiorari.

On May 14, 1971, the Court of Appeals granted Lamar's motion for stay of mandate pending review by this Court (see Appendix to Petition for a Writ of Certiorari, p. 45). The mandate was stayed to May 30, 1971, subject to

the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure. Four days following the grant of stay of mandate, to-wit, on May 18, 1971, Lamar filed its Petition for a Writ of Certiorari in this Court, thereby continuing the effectiveness of the stay of mandate until disposition of the Petition for Writ of Certiorari. (Rule 41 (b), *supra*).

Thus, as of May 20, 1971, the *status quo* in this matter had been properly preserved. However, on May 21, 1971, in the face of the stay of mandate, the Commission issued a Memorandum Opinion and Order, (a copy of which is printed in the Appendix hereto, p. 1), which dramatically altered the *status quo*. The Order directed CII to file an application for license, request for program test authority and call sign, and an appropriate loan agreement implementing its financial ability to commence operating WLBT. Upon the filing of such documents by CII, a ten (10) day period was to commence during which CII and Lamar were to negotiate a lease agreement with respect to CII's operation of Lamar's physical facilities. Upon execution of the agreement, CII was to commence operating.

The Commission's Order of May 21, 1971, further directs that Lamar deposit "in escrow" all profits earned *by Lamar* from its operation of WLBT from April 17, 1971[1] to the date of the execution of the lease agreement with CII, at which time the said profits so held in escrow are to be turned over forthwith to CII for distribution by it to third parties, namely, educational interests in Mississippi.

On May 26, 1971, CII filed the documents called for by the Commission's Order of May 21, 1971. Thereafter, on

[1] April 17, 1971 is the date upon which the Commission considers its stay to have expired, i.e., thirty (30) days after action by the Court of Appeals on Lamar's motion for stay in that Court.

May 28, 1971, the Commission directed a letter to CII advising it that its documents complied with the Commission's Order and providing that:

> ". . . Accordingly, the ten-day period permitted by the Order within which to reach an agreement as to the transfer of operation of station WLBT(TV) from Lamar Life Broadcasting Company to you expires at 3:00 a.m., June 7, 1971 . . ."[2]

In the meantime, on May 26, 1971, Lamar filed with the Court below a motion for clarification of its order staying the mandate to indicate that its stay was intended to preserve the *status quo* until final disposition by this Court of Lamar's Petition for a Writ of Certiorari or, in the alternative, to stay the effectiveness of the Commission's Order of May 21, 1971, pending this Court's action on certiorari.

The Court of Appeals issued an Order on June 4, 1971, (a copy of which is printed in the Appendix hereto, p. 9), which denied Lamar's motion for clarification and declared that the Court "considers there to be no stay on the transfer of operating authority for the station currently in effect." An Application for Stay of the enforcement of the Commission's Orders of September 8, 1970 and May 21, 1971 was thereafter filed in this Court on June 4, 1971 and is presently pending.[3]

In view of the extraordinary character of the Commission's Order of May 21, 1971, Lamar respectfully urges

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[2] A copy of the Commission's letter of May 28, 1971, is printed in the Appendix hereto, p. 8.

[3] On the same date, June 4, 1971, the Commission granted a one-week extension of the effective date of the turnover to 3:00 a.m., June 14, 1971.

this Court to review the legality of that Order in making its determination on Lamar's Petition for a Writ of Certiorari.

ARGUMENT

The Commission's Memorandum Opinion and Order of May 21, 1971, Deprives Lamar of Its Property in Contravention of Law.

Lamar's Petition for a Writ of Certiorari details its contentions as to how the Commission's Memorandum Opinion and Order of September 8, 1970, unlawfully deprives Lamar of its statutory rights and its property in contravention of Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. §307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558 (c). Those arguments need not be here repeated.

The Commission's Memorandum Opinion and Order, released May 21, 1971, seeks to implement and enforce the Commission's Order of September 8, 1970, and is thus an integral part of the action of the Commission here on review upon certiorari. However, the Commission's latest Order goes beyond the September 8, 1970, Order to require that Lamar not only cease operating WLBT as of a given date but that, further, it be *required* to operate the station, using its own capital, its own equipment, and its own staff, with the profits earned by Lamar from such operation to be turned over to CII to be distributed by it to third parties. The Order contemplates no recompense to Lamar for this period of forced operation for CII's benefit, even though the period of such operation is to occur while the issue of CII's legal right to such operation and the profits therefrom is still pending upon certiorari in this Court under an effective stay of mandate.

Lamar submits that while the Commission, if not prevented by judicial stay, may have the power, subject to judicial review of its exercise, either (1) to require Lamar to take the station off the air completely; or (2) to authorize Lamar to operate pending certiorari with the profits properly impounded and held in escrow until this Court acts on the petition for writ of certiorari, the Commission cannot, as its May 21, 1971 Order requires, force Lamar to operate WLBT, pending certiorari, as the agent of and for the benefit of CII, without reimbursement, with the profits to be paid to CII and distributed by it to third parties. To do so is to deprive Lamar of its lawfully earned profits with no recompense whatsoever for the efforts expended and expense incurred by Lamar in operating the station for the period involved.

The unlawful deprivation of Lamar's rights and property as a result of the May 21, 1971 Order is underscored by the fact that CII has no assets whatsoever, except for borrowed working capital from the United Methodist Church. As a non-profit corporation, CII has no invested equity capital. It must rely entirely for the operation of WLBT upon prospective but speculative profits from the operation and upon a line of credit the terms of which (1) require the pledge of all accounts receivable as collateral; and (2) affirmatively prevent CII from using the proceeds of the loan to pay off prior indebtedness or for collateral for other indebtedness.

Thus, if Lamar pays over its profits to CII pending certiorari, without recompense, to be forthwith distributed by CII to third parties, as required by the Commission's latest Order, and if this Court thereafter grants certiorari and reverses on the merits, Lamar's profits will be forever lost. The most that Lamar will have is a worthless action for damages against a penniless and defunct

non-profit corporation. Further, even if this Court denies certiorari or grants certiorari but affirms on the merits, since the Commission's Order contemplates no reimbursement by CII to Lamar for the period of forced operation, in the form of lease rental or otherwise, Lamar will nevertheless suffer an unlawful deprivation of its property. The damage, in this event, would be measured by the reimbursement to which Lamar was lawfully entitled for the use of its capital, staff and equipment but which it was denied.

Lamar's Petition for a Writ of Certiorari urges that the September 8, 1970, Order of the Commission deprives Lamar of its statutory right to operate WLBT(TV) as a "hold-over" licensee under Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. §307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. §558(c). The Commission's Order of May 21, 1971, clearly compounds the injury. Indeed, even if this Court should deem the Commission's Order of September 8, 1970, to be a lawful exercise of the Commission's power, the Commission's Order of May 21, 1971, affirmatively directing Lamar to work for CII without recompense from April 17, 1971, to June 14, 1971, while the issue as to the legality of the grant of operating authority to CII is *sub judice* upon petition for writ of certiorari in this Court, constitutes an unlawful deprivation of Lamar's rights.

CONCLUSION

For the reasons above stated, it is respectfully requested that this Court review the Commission's Order of May 21, 1971, in reaching its determination on Lamar's Petition for a Writ of Certiorari.

Respectfully submitted,

PAUL A. PORTER
REED MILLER
DAVID H. LLOYD
1229—19th Street, N.W.
Washington, D.C. 20036
Attorneys for Lamar Life Broadcasting Company

Of Counsel:

ARNOLD & PORTER
1229—19th Street, N.W.
Washington, D.C. 20036

APPENDIX

FCC 71-543
62964

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. BPCTI-11

In the matter of:

COMMUNICATIONS IMPROVEMENTS, INC.
Jackson, Mississippi

Motion to discontinue operation
and to impound profits

Memorandum Opinion and Order

Adopted: May 19, 1971 Released: May 21, 1971

By the Commission: Commissioners Bartley and Robert E. Lee absent. Commissioner Johnson concurring in part and dissenting in part.

1. Now under consideration are: (a) a motion filed April 20, 1971, by Communications Improvement, Inc. (CII), grantee of an interim authorization to operate a commercial television broadcast station on channel 3, Jackson, Mississippi, seeking an order from the Commission that would (1) require Lamar Life Broadcasting Company (Lamar) to discontinue operation of television broadcast station WLBT, channel 3, Jackson, Mississippi, (2) impound the profits generated by the station since September 8, 1970, and (3) in the alternative, give a declaratory ruling that our stay of the effective date of the grant of interim

authority to CII expired on April 17, 1971; and (b) an opposition to the motion filed April 26, 1971, by Lamar.[1]

2. CII's motion arises out of the following events. In *Lamar Life Broadcasting Company,* 25 FCC 2d 101, released May 4, 1970, we designated for comparative hearing five competing applications for a construction permit to operate a commercial television station on channel 3, Jackson, Mississippi. Subsequently. we granted interim authority to CII to operate station WLBT(TV) pending the outcome of a final determination on the applications in hearing, *Lamar Life Broadcasting Company,* 26 FCC 2d 100, 20 RR 2d 167, released September 8, 1970. In *Lamar Life Broadcasting Company,* 25 FCC 2d 619, released September 16, 1971, we denied Lamar's petition for stay pending judicial review. We did order, however, that:

> . . . if Lamar Life Broadcasting Company notifies the Commission within two (2) days of the release date of this Order that it intends to seek a stay from the United States Court of Appeals for the District of Columbia Circuit and seeks such a stay within seven (7) days of the release date of this Order, our Memorandum Opinion and Order, *Lamar Life Broadcasting Company,* FCC 70-957, released September 8, 1970, IS STAYED until thirty (30) days after the Court acts on Lamar Life Broadcasting Company's motion for stay. (25 FCC 2d at 620).

Lamar seasonably filed a motion for stay with the Court and thereby came within the terms of the quoted language. On March 17, 1971, the Court issued a *per curiam* order (Case No. 24,613) upholding our September 8th decision on the merits and dismissed as moot related motions, including Lamar's motion for stay pending appeal. On March

[1] We consider CII's motion to be one for temporary relief under section 1.45(d) of our rules. Under that rule, no reply pleadings are permitted. We therefore deny CII's motion to accept a reply pleading filed May 3, 1971. We also deny Lamar's motion to file a supplemental pleading, filed May 3, 1971, to respond to CII's reply.

30, 1971, Lamar filed with the Court a petition for rehearing of the *per curiam* order and suggested a rehearing *en banc*. The Court denied that petition on April 30, 1971. On May 14, 1971, the Court granted Lamar's motion to stay mandate until May 30, 1971.

3. Lamar takes the position that an opinion of the Court of Appeals is not self-executing[2] and that it takes the issuance of a mandate for the Court to "act."[3] Pending court action, according to Lamar, the Commission may preserve the *status quo*, but may not decide substantive rights that are the subject of the appeal.[4] Since the Court has stayed its mandate, and since Lamar has petitioned for a writ of certiorari from the Supreme Court which automatically stays the issuance of a mandate under Rule 41 of the Federal Rules of Appellate Procedure, Lamar concludes that the Court has not "acted." Thus, Lamar asserts, the stay of the effective date of the grant of interim authority to CII is still in effect under the terms of the Commission's Memorandum Opinion and Order to September 16, 1970, which is cited and, in part, quoted above. Since the stay and the merits of the case both go to the issue of whether Lamar is to continue operation of station WLBT(TV), Lamar also contends that a grant of CII's motion would not preserve the *status quo* but would decide the substantive issue before the Court. Lamar urges, therefore, that the stay should remain in effect to preserve the *status quo* so as not to "oust the Court of its jurisdiction."

4. CII takes the position that the Commission expressly denied a petition for stay pending judicial review on the merits. The Commission's stay, CII argues, was only to

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[2] Citing *Petition of Buscaglia*, 145 F. 2d 428 (1st Cir. 1944).

[3] Citing *Merrimack River Savings Bank* v. *Clay*, 219 U.S. 527, 31 S. Ct. 295 (1911); *Gill* v. *Commissioner of Internal Revenue*, 306 F. 2d 902 (3rd Cir. 1962); and *Bailey* v. *Henslee*, 309 F. 2d 840 (8th Cir. 1962).

[4] Citing *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 42 S. Ct. 264 (1922).

afford Lamar an opportunity to seek a stay from the Court. The Court has now issued a decision on the merits and dismissed the motion for stay as moot. CII contends that if the Commission's stay order is interpreted, as Lamar does, to require the issuance of a mandate ". . . the effect would be that Lamar would obtain under paragraph 4 (quoted above) of the Commission's stay order the very relief which the Commission expressly denied . . ."

5. In our decision of September 16, 1970, we denied Lamar's request for a stay pending judicial review of the entire proceeding. Instead, we granted a stay solely to afford the Court the opportunity to pass on a motion for stay to be filed by Lamar. Lamar would read our decision as granting, rather than denying, its motion for stay pending judicial review. It is true, of course, that a court technically acts on the merits by issuing a mandate. However, a mandate is not issued as to orders disposing of motions for stay. Thus, the Court "acts" on a motion for stay by issuing its order. In this case this was done by the Court's order of March 17, 1971, in Case No. 24,613. We had anticipated that the Court would have acted on the motion for stay prior to a decision on the merits. We do not believe, however, that a different result obtains because the Court issued a decision on the merits and, in the same document, dismissed as moot the motion for stay. We are of the view, therefore, that the Court has acted and that our stay has dissolved by its own terms.[5] Accordingly, we hold that the grant of interim authority to CII was effective at 3:00 a.m., April 17, 1971. As will be seen below,

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[5] In our opposition to Lamar's motion to stay mandate, we advised the Court that this was our interpretation and that, unless the Court expressly directed otherwise, the Commission would feel free to reach a decision on the motion now under consideration. Lamar, responding to that pleading, urged that any order staying the mandate should make clear that the effective date of our grant of interim authority to CII is also to be stayed. The Court considered those pleadings but declined to add the language suggested by Lamar.

if Lamar wishes to seek a judicial stay of our action, there will be time to file an appropriate petition.

6. Lamar nevertheless continues to operate station WLBT(TV) based on its interpretation of when the Court "acts." This brings us to the question of the disposition of profits resulting from Lamar's continued operation of the station. CII urges that we impound profits from September 8, 1970, the date of release of our Memorandum Opinion and Order granting CII's application for interim authority. However, having once declined to impound profits, *Lamar Life Broadcasting Company,* 21 FCC 2d 277, 18 RR 2d 274 (1970), we agree with Lamar that impounding of profits as of that date would be unconscionable. We do believe that it is appropriate, in these circumstances, to impound profits as of the effective date of the grant of interim authority; that is, April 17, 1971. In this manner, we shall continue the station's service to Jackson, but shall not permit Lamar to profit by its continued operation. We expect the profits to be deposited in an escrow account at a financial institution that is mutually acceptable to CII and Lamar. In determining profits, we shall require Lamar to use the accounting practices and procedures it now uses for Federal income tax purposes. We shall also require that Lamar provide us and/or CII with an accounting at such intervals as we may deem appropriate.

7. There is good reason for permitting Lamar to continue operation of station WLBT(TV) for a brief period, since CII is not in a position to take over operation of the station. It has not filed a license application, a request for program test authority, or a request for a call sign. In addition, Lamar alleges that a loan to CII from the United Methodist Church, upon which we relied in finding CII financially qualified, has not been reduced to final form. Accordingly, CII should submit as soon as possible a license application, appropriate requests for program test authority and for a call sign, and an executed copy of an appropriate loan agreement for $300,000.

8. After CII files all the material requested above, we believe that it is appropriate to permit the parties a further ten-day period to complete their negotations as to employees, the leasing of facilities, and other aspects of the transfer. Although both Lamar and CII allege that, to date, the other has not been negotiating as expeditiously as it might, we do not believe that a significant question as to a lack of good faith has been raised. We expect good faith bargaining will result in a satisfactory agreement within the further ten-day period specified above. Upon the execution of a satisfactory agreement between Lamar and CII, any funds in the escrow account will be turned over to CII for distribution in accordance with its representations to us.

9. Accordingly, IT IS ORDERED that, to the extent indicated above, the Motion of Communications, Improvement, Inc., IS GRANTED, and in all other respects IS DENIED.

10. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company WILL PLACE IN ESCROW all profits generated by the operation of station WLBT(TV) after 3:00 a.m., April 17, 1971, in a financial institution that is mutually acceptable to Lamar Life Broadcasting Company and Communications Improvement, Inc.

11. IT IS FURTHER ORDERED that "profits" shall be determined by the accounting practices and procedures used by Lamar Life Broadcasting Company for Federal income tax purposes.

12. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company shall submit an accounting of profits to the Commission and/or Communications Improvement, Inc., at the Commission's request at such intervals as we may deem appropriate.

13. IT IS FURTHER ORDERED that Communications Improvement, Inc., SHALL SUBMIT a license application; appropriate requests for program test authority and for a call

sign; and an executed copy of an appropriate loan agreement for $300,000.

14. IT IS FURTHER ORDERED that when Communications Improvement, Inc., complies with all the requirements of paragraph 13, above, Lamar Life Broadcasting Company and Communications Improvement, Inc., shall have an additional ten (10) days from that date to reach an agreement as to the transfer of operation of station WLBT(TV) to Communications Improvement, Inc., and, upon the execution of that agreement, any funds in the escrow account SHALL BE PAID to Communications Improvement, Inc.

FEDERAL COMMUNICATIONS COMMISSION

/s/ BEN F. WAPLE
Ben F. Waple
Secretary

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

May 28, 1971

In reply refer to:
8820

Communications Improvement, Inc.
4074 North State Street
Jackson, Mississippi 39206

Gentlemen:

This is in reference to the materials tendered by you on May 26, 1971, in response to the Commission's Memorandum Opinion and Order (subsequently "Order") in *Communications Improvement, Inc.*, FCC 71-543, adopted May 19, 1971, released May 21, 1971.

The materials submitted comply with the Commission's Order. Accordingly, the ten-day period permitted by the Order within which to reach an agreement as to the transfer of operation of station WLBT(TV) from Lamar Life Broadcasting Company to you expires at 3:00 a.m., June 7, 1971. Program test authority will be issued to you in due course.

Sincerely yours,

/s/ FRANCIS R. WALSH
Francis R. Walsh
Chief, Broadcast Bureau

cc:
LAMAR LIFE BBOADCASTING COMPANY
MOORE, BERSON, HAMBURG & BERNSTEIN
ARNOLD & PORTER

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,613—September Term, 1970

LAMAR LIFE BROADCASTING COMPANY,

Appellant,

—v.—

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

CIVIC COMMUNICATIONS CORPORATION, DIXIE NATIONAL BROADCASTING CORPORATION, JACKSON TELEVISION, INC., COMMUNICATIONS IMPROVEMENT, INC., CHANNEL 3, INC.,

Intervenors.

Before:

McGOWAN and TAMM,

Circuit Judges.

Order

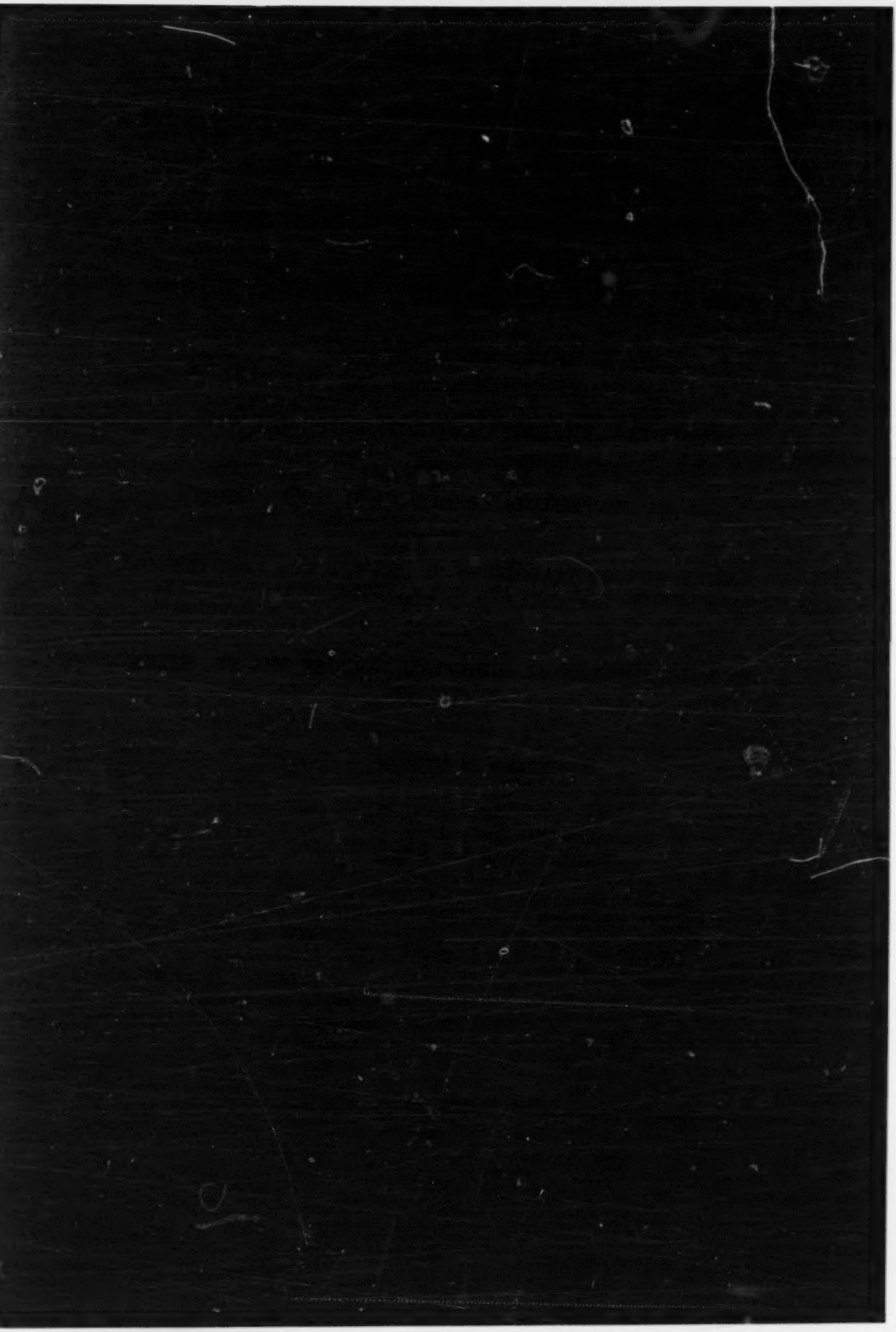
On consideration of appellant's motion for clarification of order staying mandate so as to maintain status quo pending final disposition by Supreme Court of Lamar's petition for writ of certiorari, the oppositions thereto, and the reply of appellant to those oppositions, it is

ORDERED by the Court that the motion for clarification is denied.

The Court considers there to be no stay on the transfer of operating authority for the station currently in effect.

Per Curiam

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 4 1971
s/ NATHAN J. PAULSON
Clerk



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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1719

LAMAR LIFE BROADCASTING COMPANY, PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 23–24) is not officially reported. The opinion of the Federal Communications Commission (Pet. App. 1–22) is reported at 26 F.C.C. 2d 100.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1971 (Pet. App. 23–24), and rehearing was denied on April 30, 1971 (Pet. App. 44). The petition for a writ of certiorari was filed on May 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, which had previously been held to be "at best, a licensee in name only" which must "take its place among competing applicants" (Pet. App. 42), was properly denied interim authority to operate a commercial television station on channel 3, Jackson, Mississippi.

STATUTES INVOLVED

Section 307(d) of the Communications Act of 1934, as amended (47 U.S.C. 307(d)), provides in pertinent part:

> * * * Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses * * * if the Commission finds that public interest, convenience, and necessity would be served thereby. * * * Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. * * *

Section 402(h) of the Communications Act of 1934, as amended (47 U.S.C. 402(h)), provides:

> In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do

so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

STATEMENT

In 1965, the Federal Communications Commission, in lieu of the requested three-year renewal, granted petitioner a one-year "conditional" renewal of its license to operate television station WLBT on channel 3 in Jackson, Mississippi; the probationary renewal was awarded over a petition to deny, filed by various organizations and individuals, which raised questions regarding Lamar's service to the black community and its compliance with the Commission's Fairness Doctrine. *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143. Because the Commission had denied the complainants the right to intervene as parties and because the public interest issue raised by them had been found by the Commission to be so serious as to warrant only a limited probationary renewal, the court of appeals reversed and remanded the case to the Commission with instructions that it hold an evidentiary hearing on Lamar's renewal application. *Office of Communitation of The United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 994 (C.A.D.C.). On rehearing, with the participation of the community representatives, the Commission granted Lamar's application to continue operating the station for a new three-year term. *Lamar Life Broadcasting Co.*, 14 F.C.C. 2d 431. The intervenors again appealed.

In 1969, the court of appeals set aside the Commis-

sion's determination a second time, holding that, in view of the Commission's prior finding that petitioner's earlier conduct prevented the grant of a full-term license, the burden was on the petitioner to demonstrate that it was in the public interest for its license to be renewed. Since petitioner failed to meet this burden, the court concluded, "* * * the grant of a license [to Lamar] must be vacated forthwith and the Commission * * * directed to invite [new] applications to be filed for the license." *Office of Communication of The United Church of Christ* v. *Federal Communications Commission*, 425 F. 2d 543, 550 (Pet. App. 38). The court explicitly declined to disqualify Lamar from filing a new application, however, and it directed the Commission (Pet. App. 38):

> * * * to consider a plan for interim operation pending completion of its hearings; if it finds it in the public interest to permit the present licensee to carry on interim operations that alternative is available. The Commission is free to consider whether net earnings of the licensee should be impounded by the Commission pending final disposition of this license application. (Footnote omitted.)

The Commission, seeing a possible conflict between the court's mandate regarding interim operations and Section 307(d) of the Communications Act, petitioned for rehearing, requesting clarification on this point.[1] On September 5, 1969, the petitions for rehearing were denied *per curiam*, 425 F. 2d 550 (Pet. App. 39, 40), but with an accompanying statement by two

[1] Lamar also petitioned for rehearing, on similar grounds.

members of the deciding panel, Judges McGowan and Tamm,[2] further explaining their earlier decision (Pet. App. 41):

> The Commission points to the provision of 47 U.S.C. § 307(d) to the effect that, pending final disposition of a renewal application, the Commission "shall continue such license in effect." It says that this means that the licensee seeking renewal must be regarded as having continuing authority until its application has been finally disposed of adversely to it—and this last, so it is said, only the Commission can do. It is doubtful if Congress intended that a licensee should be able to remain in possession indefinitely merely because the Commission proves unable or unwilling to conduct proceedings which will survive judicial scrutiny. A licensee holding over on any such basis is, at best, a licensee in name only, and it is presumably in such light that the licensee here involved will take its place among competing applicants.

Thereafter, pursuant to the court of appeals' mandate, the Commission vacated the grant of Lamar's renewal application, requested a new application from Lamar, and invited competing applications for the license. A decision as to interim operation of the facility was postponed until such time as all applications were before the Commission. *Lamar Life Broadcasting Co.*, 20 F.C.C. 2d 635. Lamar sought reconsideration, contending that a grant of interim authorization to any other party would violate Lamar's asserted right under Section 307(d) to continue oper-

[2] The third panel member, Judge Burger, had since been appointed Chief Justice of the United States.

ation of the television station pending a final determination on its renewal application. In denying reconsideration, the Commission concluded that, since the court had said one alternative available to it would be to permit Lamar to carry on interim operations, it therefore had "under the mandate of the Court * * * authority to consider various alternatives, and to authorize an interim operator other than Lamar if [it found] that such an alternative would serve the public interest." *Lamar Life Broadcasting Co.*, 21 F.C.C. 2d 277, 279.[3]

Shortly thereafter, the Commission specifically asked for the filing of requests for interim authorizations. *Lamar Life Broadcasting Co.*, 22 F.C.C. 2d 47. Requests were filed by Lamar,[4] by a joint venture con-

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[3] On February 3, 1970, Lamar appealed from the Commission's decision inviting new applications and from its denial of Lamar's reconsideration request. *Lamar Life Broadcasting Co.* v. *Federal Communications Commission*, Case No. 23,920 (C.A.D.C.). This appeal was consolidated by the court below with *Civic Communications Corp.* v. *Federal Communications Commission*, No. 23,953 (C.A.D.C.). The Commission had denied the petition of Civic, a new applicant, to impound Lamar's television profits pending selection of an interim operator, preferring to deal with the issue of interim profits at the time the interim operator was selected. By order of April 14, 1970, the court held proceedings in both appeals in abeyance pending Commission disposition of applications for interim authority.

[4] Lamar had also separately filed with the Commission (1) an updated renewal application (Form 303), and (2) an application for a construction permit for channel 3, filed under protest (Form 301). Competing applications were received from four new applicants for the license. These applications were duly designated for a comparative hearing which is now in process. *Lamar Life Broadcasting Co.*, 25 F.C.C. 2d 101, reconsideration denied, 24 F.C.C. 2d 618.

sisting of three of the applicants for regular authorization, and by Communications Improvement, Inc. ("CII"), a non-applicant and non-profit entity. In September 1970, the Commission determined that a grant to CII would best serve the public interest. *Lamar Life Broadcasting Co.,* 26 F.C.C. 2d 100 (Pet. App. 1). This decision was based primarily on the fact that (Pet. App. 15–16):

> * * * [CII's] proposal avoids any possible prejudice to the applicants whose mutually exclusive applications have been designated for hearing, and is in keeping with the principles enunciated in *Community Broadcasting Co., Inc.* v. *F.C.C.,* 274 F.2d 753, 19 R.R. 2047 (1960). [Footnote omitted.] The lack of prejudice is of controlling comparative significance and outweighs all other comparative factors, see *Oak Knoll Broadcasting Corp.,* [2 Pike & Fischer, R.R. 2d 1011 (1964)].[5]

Thus, the Commission terminated Lamar's operating authority and made the grant to CII effective 30 days from the release date of the order (Pet. App. 19).

Lamar appealed to the court of appeals (Case No. 24,613), and at the same time sought a stay from the Commission of the termination of its operating authority pending the outcome of the appeal. The Commission denied this stay request on September 16, 1970. *Lamar Life Broadcasting Co.,* 25 F.C.C. 2d 619. La-

[5] The profits from CII's operation will be devoted to nonprofit, educational functions related to broadcasting in the State of Mississippi. This, plus the inherent weaknesses of a joint interim operation made up of applicants for regular authority, also weighed in CII's favor (Pet. App. 16).

mar thereupon asked the court of appeals for a stay pending appeal and for an immediate decision on the merits.

On March 17, 1971, the court of appeals granted Lamar's motion for immediate decision and affirmed the Commission's decision terminating Lamar's operating authority and granting interim authority to CII; it dismissed the stay application as moot (Pet. App. 23). A petition for rehearing and rehearing *en banc* was denied on April 30, 1971 (Pet. App. 43–44); on May 14, 1971, the court stayed its mandate until May 30, 1971, pending the filing of a petition for a writ of certiorari (Pet. App. 45).[6]

ARGUMENT

The petition presents no question of general importance; it arises out of a *sui generis* proceeding that has been under the continuous supervision of the court below since 1965. The particular decision challenged in this petition holds only that the Commission acted within the terms of the court's earlier mandate when it ordered the termination of Lamar's operating authority.

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[6] Meanwhile CII had requested an order from the Commission to take Lamar off the air and impound its profits since September 8, 1970, the date of the grant of interim authority to CII. The Commission, deciding that the date when Lamar's operating authority came to an end was April 17, 1971, 30 days after the court of appeals' decision, impounded profits as of that date. *Communications Improvements, Inc.*, F.C.C. 71–543, released May 21, 1971, reprinted as Appendix A, *infra*. Lamar again appealed, and, on June 4, 1971, the court of appeals ruled that its May 14 stay of mandate did not constitute a "stay on the transfer of operating authority for the station * * *" (Pet. Supp. Br. App. 9).

Petitioner premises its entire argument on Section 307(d) of the Communications Act and Section 9(b) of the Administrative Procedure Act (5 U.S.C. (Supp. V) 558(c)) both of which require that an applicant for license renewal be permitted to continue operating until a final decision is reached on its renewal application. Those statutory provisions, however, cannot avail petitioner in the circumstances of this case. Here, a final decision was reached on petitioner's renewal application almost two years ago by the court of appeals. *Office of Communication of The United Church of Christ* v. *Federal Communications Commission,* 425 F. 2d 543 (C.A.D.C.), rehearing denied, 425 F. 2d 550 (C.A.D.C.).

There, the court, in ordering the Commission to vacate its earlier grant of petitioner's renewal application, held that the administrative record was in such condition that rehearing or reconsideration by the Commission would "serve no useful purpose" (Pet. App. 38). Accordingly, it terminated the license *renewal* aspect of the proceedings and ordered the Commission to invite new applicants to compete for petitioner's license; petitioner was not to be disqualified from filing a new application, but it had to compete on an equal footing with the others. In short, petitioner had lost its special status of renewal applicant.

That ruling was never challenged in this Court;[7] petitioner's belated attempt to seek review of it

[7] Petitioner's sole explanation for not then petitioning this Court for a writ of certiorari is that it thought that the court of appeals "had recognized its right to continue operating as a hold-over licensee" (Pet. 5 n. 10). There is, however, nothing in the court's original opinion (Pet. App. 25–38), or in its

now is obviously prejudicial to the competing applicants and to the Commission. Petitioner has filed a new application which is now pending before the Commission (*supra* n. 4); its *renewal* application is no longer under consideration. Thus, as fully explained by the court of appeals in denying the earlier petition for rehearing (Pet. App. 42), to the extent that petitioner can now be considered the licensee, it is, "at best, a licensee in name only." Its position before the Commission is now no different than that of any other applicant for the facility. In these special circumstances, the statutory provisions on which petitioner relies do not apply.

In any event, the court of appeals did not err in directing the Commission to entertain only new applications for the license. Under Section 402(h) of the Communications Act (47 U.S.C. 402(h)), the court had authority appropriately to direct the course of further proceedings in its order reversing the Commission's decision.[8] In light of the facts that the petitioner had repeatedly failed to establish its claim to renewal, that two renewal grants in six years had been vacated by the court, and that there were serious deficiencies in the Commission's record, the determination to begin the application process anew, with

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supplemental statement accompanying the denial of the petition for rehearing (Pet. App. 40–42), which suggests such recognition. The clear import of the court's rulings was exactly the opposite.

[8] Section 402(h) was "intended to confer upon the appellate court a measure of control commensurate with the dignity and responsibility of that tribunal, requiring the Commission to give effect to the judgment of the Court * * *." Senate Rept. No. 44, 82d Cong., 1st Sess., p. 12.

petitoner no longer in the role of the typical renewal applicant but rather competing on an equal basis with newcomers, was entirely appropriate. Cf. *WORZ, Inc.* v. *Federal Communications Commission,* 345 F. 2d 85; *Jacksonville Broadcasting Corp.* v. *Federal Communications Commission,* 348 F. 2d 75, certiorari denied, 382 U.S. 893; *Greater Boston Television Corp.* v. *Federal Communications Commission,* Case Nos. 17,785 et al. C.A.D.C., decided November 13, 1970, petition for certiorari pending.[9]

It is therefore clear that the extraordinary history of this proceeding warranted the court's holding that

[9] Contrary to petitioner's contention (Pet. 10–11, n. 14), there is no conflict between this case and *Consolidated Nine, Inc.* v. *Federal Communications Commission*, 403 F. 2d 585 (C.A.D.C.). In that case, a new comparative hearing had been ordered, and the Commission left the existing operator on the air in the interim even though his original grant of regular authority had been twice judicially voided. In overturning the Commission, the court of appeals concluded that, on the facts there presented, the situation fell somewhere between a valid license up for renewal and a comparative proceeding for a new facility, but that it was closer to the latter. Thus, the court held that the existing operator could not have the interim authority because of the considerations first laid down in *Community Broadcasting Co.* v. *Federal Communications Commission*, 274 F. 2d 753 (C.A.D.C.). *Consolidated Nine* is, therefore, quite similar to the instant situation, where the court has twice voided the Commission's renewal grants and has ordered a *new* comparative hearing. That *Consolidated Nine* involved an original grant, while renewal grants were at issue in the proceedings here, is a technical distinction without practical difference. The same can be said about the fact that the court did not, in its initial order prohibit Lamar from being the interim operator, as it had done in *Consolidated Nine*; in the instant case it left the choice to the Commission and, in its order of March 17, 1971, affirmed that choice.

petitioner was no longer a renewal applicant for purposes of Section 307(d). Accordingly, the subsequent grant by the Commission of interim operating authority to CII, as the most effective way to "place all applicants on an equal footing in the comparative hearing" (Pet. App. 17), in no way interfered with petitioner's rights; it was entirely consistent with the court of appeals' mandate (Pet. App. 3–6).[10]

Nor is there merit in petitioner's contention that the Commission has treated its renewal application as still pending. In the order designating petitioner and the other four applicants for a comparative hearing, the Commission made it clear that while petitioner's renewal application was *technically* to be held in abeyance, its fate would depend on the result of the comparative hearing where petitioner is to be "judged on its basic [new] application." 25 F.C.C. 2d at 101. And again, in a recent order declining to add the former renewal issues to the comparative proceeding, the Commission recognized expressly that the court intended "that consideration of the renewal be terminated." F.C.C. 71–379, released April 21, 1971, App. B, *infra*.

[10] Nor can the Commission be faulted for proceeding to implement its order designating CII as interim operator (*supra* n. 6). Contrary to petitioner's argument in its Supplemental Brief, the court below has not issued a stay of the Commission's order, or its affirmance thereof, but has merely stayed its mandate pending the filing of a petition for certiorari in this Court (Pet. Supp. Br. App. 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1971.

APPENDIX A

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

(FCC 71-543, 62964; File No. BPCTI-11)

IN THE MATTER OF COMMUNICATION IMPROVEMENTS, INC., JACKSON, MISS.

(Motion to discontinue operation and to impound profits)

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1971; Released: May 21, 1971.

By the Commission: Commissioners Bartley and Robert E. Lee absent. Commissioner Johnson concurring in part and dissenting in part.

1. Now under consideration are: (a) a motion filed April 20, 1971, by Communications Improvement, Inc. (CII), grantee of an interim authorization to operate a commercial television broadcast station on channel 3, Jackson, Mississippi, seeking an order from the Commission that would (1) require Lamar Life Broadcasting Company (Lamar) to discontinue operation of television broadcast station WLBT, channel 3, Jackson, Mississippi, (2) impound the profits generated by the station since September 8, 1970, and (3) in the alternative give a declaratory ruling that our stay of the effective date of the grant of interim authority to CII expired on April 17, 1971; and (b)

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an opposition to the motion filed April 26, 1971, by Lamar.[1]

2. CII's motion arises out of the following events. In *Lamar Life Broadcasting Company,* 25 FCC 2d 101, released May 4, 1970, we designated for comparative hearing five competing applications for a construction permit to operate a commercial television station on channel 3, Jackson, Mississippi. Subsequently, we granted interim authority to CII to operate station WLBT(TV) pending the outcome of a final determination on the applications in hearing, *Lamar Life Broadcasting Company,* 26 FCC 2d 100, 20 RR 2d 167, released September 8, 1970. In *Lamar Life Broadcasting Company,* 25 FCC 2d 619, released September 16, 1971, we denied Lamar's petition for stay pending judicial review. We did order, however, that:

> * * * if Lamar Life Broadcasting Company notifies the Commission within two (2) days of the release date of this Order that it intends to seek a stay from the United States Court of Appeals for the District of Columbia Circuit and seeks such a stay within seven (7) days of the release date of this Order, our Memorandum Opinion and Order, *Lamar Life Broadcasting Company,* FCC 70–957, released September 8, 1970, IS STAYED until thirty (30) days after the Court acts on Lamar Life Broadcasting Company's motion for stay. (25 FCC 2d at 620).

Lamar seasonably filed a motion for stay with the Court and thereby came within the terms of the

[1] We consider CII's motion to be one for temporary relief under section 1.45(d) of our rules. Under that rule, no reply pleadings are permitted. We therefore deny CII's motion to accept a reply pleading filed May 3, 1971. We also deny Lamar's motion to file a supplemental pleading, filed May 3, 1971, to respond to CII's reply.

quoted language. On March 17, 1971, the Court issued a *per curiam* order (Case No. 24,613) upholding our September 8th decision on the merits and dismissed as moot related motions, including Lamar's motion for stay pending appeal. On March 30, 1971, Lamar filed with the Court a petition for rehearing of the *per curiam* order and suggested a rehearing *en banc*. The Court denied that petition on April 30, 1971. On May 14, 1971, the Court granted Lamar's motion to stay mandate until May 30, 1971.

3. Lamar takes the position that an opinion of the Court of Appeals is not self-executing[2] and that it takes the issuance of a mandate for the Court to "act."[3] Pending court action, according to Lamar, the Commission may preserve the *status quo,* but may not decide substantive rights that are the subject of the appeal.[4] Since the Court has stayed its mandate, and since Lamar has petitioned for a writ of certiorari from the Supreme Court which automatically stays the issuance of a mandate under Rule 41 of the Federal Rules of Appellate Procedure, Lamar concludes that the Court has not "acted." Thus, Lamar asserts, the stay of the effective date of the grant of interim authority to CII is still in effect under the terms of the Commission's Memorandum Opinion and Order to September 16, 1970, which is cited and, in part, quoted above. Since the stay and the merits of the case both go to the issue of whether Lamar is to continue operation of station WLBT(TV), Lamar also contends that a grant of CII's motion would not preserve the

[2] Citing *Petition of Buscaglia*, 145 F. 2d 428 (1st Cir. 1944).

[3] Citing *Merrimack River Savings Bank* v. *Clay*, 219 U.S. 527, 31 S. Ct. 295 (1911); *Gill* v. *Commissioner of Internal Revenue*, 306 F. 2d 902 (3rd Cir. 1962); and *Bailey* v. *Henslee*, 309 F. 2d 840 (8th Cir. 1962).

[4] Citing *Newton* v. *Consolidated Gas Co.*, 258 U.S. 165, 42 S. Ct. 264 (1922).

status quo but would decide the substantive issue before the Court. Lamar urges, therefore, that the stay should remain in effect to preserve the *status quo* so as not to "oust the Court of its jurisdiction."

4. CII takes the position that the Commission expressly denied a petition for stay pending judicial review on the merits. The Commission's stay, CII argues, was only to afford Lamar an opportunity to seek a stay from the Court. The Court has now issued a decision on the merits and dismissed the motion for stay as moot. CII contends that if the Commission's stay order is interpreted, as Lamar does, to require the issuance of a mandate ". . . the effect would be that Lamar would obtain under paragraph 4 (quoted above) of the Commission's stay order the very relief which the Commission expressly denied * * *"

5. In our decision of September 16, 1970, we denied Lamar's request for a stay pending judicial review of the entire proceeding. Instead, we granted a stay solely to afford the Court the opportunity to pass on a motion for stay to be filed by Lamar. Lamar would read our decision as granting, rather than denying, its motion for stay pending judicial review. It is true, of course, that a court technically acts on the merits by issuing a mandate. However, a mandate is not issued as to orders disposing of motions for stay. Thus, the Court "acts" on a motion for stay by issuing its order. In this case this was done by the Court's order of March 17, 1971, in Case No. 24,613. We had anticipated that the Court would have acted on the motion for stay prior to a decision on the merits. We do not believe, however, that a different result obtains because the Court issued a decision on the merits and, in the same document, dismissed as moot the motion for stay. We are of the view, therefore, that the Court

has acted and that our stay has dissolved by its own terms.[5] Accordingly, we hold that the grant of interim authority to CII was effective at 3:00 a.m., April 17, 1971. As will be seen below, if Lamar wishes to seek a judicial stay of our action, there will be time to file an appropriate petition.

6. Lamar nevertheless continues to operate station WLBT(TV) based on its interpretation of when the Court "acts." This brings us to the question of the disposition of profits resulting from Lamar's continued operation of the station. CII urges that we impound profits from September 8, 1970, the date of release of our Memorandum Opinion and Order granting CII's application for interim authority. However, having once declined to impound profits, *Lamar Life Broadcasting Company*, 21 FCC 2d 277, 18 RR 2d 274 (1970), we agree with Lamar that impounding of profits as of that date would be unconscionable. We do believe that it is appropriate, in these circumstances, to impound profits as of the effective date of the grant of interim authority; that is, April 17, 1971. In this manner, we shall continue the station's service to Jackson, but shall not permit Lamar to profit by its continued operation. We expect the profits to be deposited in an escrow account at a financial institution that is mutually acceptable to CII and Lamar. In determining profits, we shall require Lamar to use the accounting practices and procedures it now uses

[5] In our opposition to Lamar's motion to stay mandate, we advised the Court that this was our interpretation and that, unless the Court expressly directed otherwise, the Commission would feel free to reach a decision on the motion now under consideration. Lamar, responding to that pleading, urged that any order staying the mandate should make clear that the effective date of our grant of interim authority to CII is also to be stayed. The Court considered those pleadings but declined to add the language suggested by Lamar.

for Federal income tax purposes. We shall also require that Lamar provide us and/or CII with an accounting at such intervals as we may deem appropriate.

7. There is good reason for permitting Lamar to continue operation of station WLBT(TV) for a brief period, since CII is not in a position to take over operation of the station. It has not filed a license application, a request for program test authority, or a request for a call sign. In addition, Lamar alleges that a loan to CII from the United Methodist Church, upon which we relied in finding CII financially qualified, has not been reduced to final form. Accordingly, CII should submit as soon as possible a license application, appropriate requests for program test authority and for a call sign, and an executed copy of an appropriate loan agreement for $300,000.

8. After CII files all the material requested above, we believe that it is appropriate to permit the parties a further ten-day period to complete their negotiations as to employees, the leasing of facilities, and other aspects of the transfer. Although both Lamar and CII allege that, to date, the other has not been negotiating as expeditiously as it might, we do not believe that a significant question as to a lack of good faith has been raised. We expect good faith bargaining will result in a satisfactory agreement within the further ten-day period specified above. Upon the execution of a satisfactory agreement between Lamar and CII, any funds in the escrow account will be turned over to CII for distribution in accordance with its representations to us.

9. Accordingly, IT IS ORDERED that, to the extent indicated above, the Motion of Communications Improvement, Inc., *IS GRANTED,* and in all other respects IS DENIED.

10. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company WILL PLACE IN ESCROW all profits generated by the operation of station WLBT(TV) after 3:00 a.m., April 17, 1971, in a financial institution that is mutually acceptable to Lamar Life Broadcasting Company and Communications Improvement, Inc.

11. IT IS FURTHER ORDERED that "profits" shall be determined by the accounting practices and procedures used by Lamar Life Broadcasting Company for Federal income tax purposes.

12. IT IS FURTHER ORDERED that Lamar Life Broadcasting Company shall submit an accounting of profits to the Commission and/or Communications Improvement, Inc., at the Commission's request at such intervals as we may deem appropriate.

13. IT IS FURTHER ORDERED that Communications Improvement, Inc., SHALL SUBMIT a license application; appropriate requests for program test authority and for a call sign; and an executed copy of an appropriate loan agreement for $300,000.

14. IT IS FURTHER ORDERED that when Communications Improvement, Inc., complies with all the requirements of paragraph 13, above, Lamar Life Broadcasting Company and Communications Improvement, Inc., shall have an additional ten (10) days from that date to reach an agreement as to the transfer of operation of station WLBT(TV) to Communications Improvement, Inc., and, upon the execution of that agreement, any funds in the escrow account SHALL BE PAID to Communications Improvement, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX B

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

IN RE APPLICATIONS OF LAMAR LIFE BROADCASTING COMPANY, JACKSON, MISSISSIPPI

Docket No. 18845, File Nos. BPCT-4320, BRCT-326

CIVIC COMMUNICATIONS CORPORATION, JACKSON, MISSISSIPPI

Docket No. 18846, File No. BPCT-4305

DIXIE NATIONAL BROADCASTING CORPORATION, JACKSON, MISSISSIPPI

Docket No. 18847, File No. BPCT-4317

JACKSON TELEVISION, INC., JACKSON, MISSISSIPPI

Docket No. 18848, File No. BPCT-4318

CHANNEL 3, INC., JACKSON, MISSISSIPPI

Docket No. 18849, File No. BPCT-4319

(For a Construction Permit)

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 1971; Released: April 21, 1971.

By the Commission: Commissioners Johnson and Houser dissenting.

1. The Commission has before it for consideration: (a) the Review Board's Memorandum Opinion and Order, FCC 70R–456, 26 FCC 2d 940, released December 31, 1970; (b) an application for review of the Board's order, *supra,* filed by Lamar Life Broadcasting Company on January 8, 1971; (c) opposition to the application for review filed by Civic Communications Corporation on January 15, 1971; (d) comments of the Broadcast Bureau filed on January 20, 1971; and (e) a reply to the opposition and comments filed by Lamar Life Broadcasting Company on January 21, 1971.

2. A statement of the pertinent background of this proceeding is set forth in our Memorandum Opinion and Order, FCC 70–817, 24 FCC 2d 618, denying reconsideration of the designation order (25 FCC 2d 101 (1970)) and need not be repeated herein.

3. On May 22, 1970, Civic Communications Corporation (Civic) filed with the Review Board a petition seeking, *inter alia,* enlargement of issues against Lamar Life Broadcasting Company (Lamar) to determine the effect upon Lamar's basic qualifications of charges that in the years 1961–1964 Lamar's programming had been unfair to various groups, particularly Negro groups, and that Lamar had discriminatorily denied such groups the opportunity for local expression over its facilities. Issues similar to those requested by Civic were specified in the Commission's 1966 order[1] designating Lamar's renewal application (BRCT–326) for hearing, except that the issues were not specifically limited to the 1961–1964 period. The Board considered that it was free under *Atlantic Broadcasting Company* (*WUST*), 5 FCC 2d 717 (1966), to reach the merits of Civic's petition to enlarge issues because it believed that the question

[1] *Lamar Life Broadcasting Co.*, 3 FCC 2d 784 (1966).

of the issues previously specified against Lamar had not been specifically considered in the Commission's designation order herein and in its order denying reconsideration thereof. The Board therefore held that it was appropriate to specify the issues requested by Civic, and, further that the matters involved are relevant to Lamar's qualifications to receive a construction permit. The Board stated that it was persuaded to add the issues essentially because it read the Court of Appeals's decision in *Office of Comunication of the United Church of Christ* v. *F.C.C.*, —— U.S. App. D.C. ——, 425 F. 2d 543 (1969), as holding that the renewal application of Lamar was unfinished business which remained to be resolved. The Board found "an apparent anomaly which could result if Lamar were ultimately to be preferred in this proceeding and the Commission were required to rule on the accompanying renewal application without the benefit of a record under the same qualifying issues which were specified earlier." (Footnote omitted.)

4. We believe that the Review Board has incorrectly appraised the present status of Lamar and the Lamar renewal application. As we read the Court's opinions, the Court did not intend that we re-try the Lamar renewal case, something the Court could readily have decreed if it believed such a course appropriate, but rather that consideration of the renewal be terminated and new applications for the channel be accepted, including a new application by Lamar if the Commission should so permit. It was made clear by the Court that Lamar was to be a renewal applicant "in name only" and that all new applicants, including Lamar, were to be treated as starting fresh with no advantage to Lamar because of its previous use of the channel. It was in the light of this situation

that we did not reinstate the former renewal issues, and that we specified the treatment to be given Lamar's past occupancy of the channel. We thus stated in the order of designation that the grant or denial of the pending renewal application (BRCT-326) for station WLBT would rest upon the determination made in this hearing with respect to Lamar's new application for a construction permit (BPCT-4320).[2] We further held that we did not think it reasonable or proper to re-try the renewal issue to permit Lamar to make a new attempt to show that it should be given a preference for above average performance. We see no need here to restate the full treatment we gave these matters in our earlier opinions. But we think it clear that inserting the former renewal issues into this matter would be inconsistent with both the Court's mandate and our own rulings subsequent to that mandate. To do so would improperly put Lamar back in the position of a renewal applicant fighting off new challengers. We find that the Review Board's order is inconsistent with the procedures which we have prescribed. In view of the consideration which we have given to these matters in our previous orders, we hold that the Board erred to the extent that it granted Civic's petition to enlarge issues and added qualifying issues against Lamar.

5. ACCORDINGLY, IT IS ORDERED That the application for review filed by Lamar Life Broadcasting Company on January 8, 1971, IS GRANTED to the extent indicated herein.

6. IT IS FURTHER ORDERED That the Review Board's Memorandum Opinion and Order, FCC

[2] This language must be read in the light of the Court's statement that Lamar is "a licensee in name only, and it is presumably in such light that . . . [Lamar] will take its place among competing applicants."

70R–456, 26 FCC 2d 940, released December 31, 1970, insofar as the Board granted a petition to enlarge issues filed by Civic Communications Corporation on May 22, 1970, and added issues against Lamar Life Broadcasting Company, IS SET ASIDE.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC. CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATONAL BROADCASTING CORPORATION, JACKSON TELEVISION, INC.,

Respondents.

OPPOSITION OF RESPONDENT DIXIE NATIONAL BROADCASTING CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC. CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORPORATION, JACKSON TELEVISION, INC.,

Respondents.

OPPOSITION OF RESPONDENT DIXIE NATIONAL BROADCASTING CORPORATION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent Dixie National Broadcasting Corporation respectfully submits that the question presented in the above-captioned Petition For A Writ Of Certiorari is not properly before this Court.

The gravamen of the claim presented by Petitioner is that the Commission improperly interpreted Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. Section 307(d), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. Section 558(c), in suspending op-

eration of Station WLBT prior to final agency determination as to whether the pending application for renewal of license of WLBT should be granted or denied.

It is obvious, from a reading of the Commission decision under review[1] that Petitioner's quarrel is with a prior decision of the United States Court of Appeals for the District of Columbia Circuit, decided June 20, 1969,[2] reconsideration denied September 5, 1969.[3] The Commission was merely carrying out a directive of the Court of Appeals in enunciating the statutory interpretation complained of here.[4]

Indeed, after the issuance of the June 20, 1969 decision by the Court of Appeals, the Commission and Petitioner itself returned to that Court urging rehearing, clarification of the Court's opinion, and suggestions for rehearing *en banc*. When the United States Court of Appeals for the District of Columbia Circuit denied the requests of the Commission and Petitioner for rehearing, for clarification, and suggestions for *en banc* hearing, on September 5, 1969, there was simultaneously issued the Statement of Judges McGowan and Tamm Accompanying The Vote To Deny The Petition Of The Federal Communications Commission For Rehearing By The Panel Or En Banc.[5] From a reading of that Statement it is manifest that Petitioner

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[1] See pp. 1-22 of the Appendix to the above-captioned Petition.

[2] See pp. 25-28 of the Appendix to the Petition.

[3] See pp. 39-42 of the Appendix to the Petition.

[4] See especially pp. 1-6 of the Appendix and the concurring opinion of Chairman Burch, at pp. 20-21 of the Appendix.

[5] Petition, Appendix, pp. 40-42.

has attempted to resurrect in another—and later—proceeding the very rationale of the Commission rejected by the Court of Appeals. Petitioner did not choose to pursue available remedies in this Court in 1969 to perfect review of the very question presented in the instant Petition.

Accordingly, notwithstanding the representations made here for the first time,[6] the instant Petition is not properly before this Court. Petitioner comes too late; the unequivocal language of the Statement of Judges McGowan and Tamm forecloses the reinstatement of an argument which Petitioner effectively waived by not seeking review of the 1969 rulings of the United States Court of Appeals for the District of Columbia Circuit. See *Bird* v. *United States*, 241 F. 2d 516 (1st Cir., 1957).

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[6] Petition, p. 5 at fn. 10. No such representation was made to the Commission or to the Court of Appeals below.

CONCLUSION

In light of the foregoing, it is respectfully submitted that the Petition For Writ Of Error should be denied.

Respectfully submitted,

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No. 1719

LAMAR LIFE BROADCASTING COMPANY,

Petitioner,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, CHANNEL 3, INC., CIVIC COMMUNICATIONS CORP., COMMUNICATIONS IMPROVEMENT, INC., DIXIE NATIONAL BROADCASTING CORP., JACKSON TELEVISION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

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The Government relies heavily upon the contention that "a final decision was reached on petitioner's renewal application almost two years ago by the court of appeals . . ." (Gov. Br. 9); that Petitioner's ". . . renewal application is no longer under consideration" (Gov. Br. 10); and that Petitioner is ". . . no longer in the role of the typical renewal applicant . . ." (Gov. Br. 11). It then begs the question by asserting that Petitioner's argument that the Commission has treated its renewal application as pending is of no avail since Petitioner's renewal is pending only in a "technical" sense. (Gov. Br. 12).

The argument of the Government ignores the basic thrust of Petitioner's (Lamar's) plea for review and the clear ruling of the Court of Appeals as to the nature of its action on Lamar's renewal application. The Court of Appeals cannot act as a "super Commission". It cannot deny a renewal application or direct its denial. Its power is limited to affirming or vacating the agency's action and remanding the matter to the agency for ultimate disposition of the application. *FRC* v. *Nelson Bros. Co.*, 289 U.S. 266, 274-78 (1933); *FCC* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946); *American Broadcasting-Paramount Theatres, Inc.* v. *FCC*, 120 U.S. App.D.C. 264, 270, 345 F.2d 954, 960 (1965), *cert. denied*, 383 U.S. 906 (1966).

The decision of the Court of Appeals rendered on June 20, 1969,[1] *appeared* to deny or direct denial of Lamar's renewal application contrary to the authorities above cited. Both the Commission and Lamar brought this to the Court's attention by petitions for rehearing. In ruling on those petitions, the two-judge panel of the court below issued a "Statement" (App. to Petition for a Writ of Certiorari, p. 40), in which it purported to lay this point to rest:

> "The Commission professes concern that the court has improperly arrogated to itself a decision which assertedly is committed only to the Commission, namely, the denial of the license renewal application because the licensee is not qualified under any circumstances, in terms of the public interest, to have the channel. *Had that been the division's purpose, it would not have contemplated that the licensee could be one of the competing applicants.* What was held

[1] Office of Communication of United Church of Christ v. FCC, 138 U.S.App.D.C. 112, 425 F.2d 543 (1969), rehearing denied *en banc*, 138 U.S.App.D.C. 120, 425 F.2d 550 (1969).

was that the proceedings on remand had been hopelessly bungled and that *the public interest was best served by taking note of the early expiration date* and getting on with a new hearing in which the Commission can decide who is best qualified to have this channel.*" (Emphasis supplied)

"* The license grant under review terminates June 1, 1970, and *proceedings to determine who should be the licensee for the term beginning on that date would have to get under way in ample time before that.*" (Emphasis supplied)

Thus, the Court of Appeals made it clear that it was not denying Lamar's renewal application or directing its denial but rather contemplated an *expedited* hearing upon Lamar's application and upon other applications which should get underway "in ample time before" the then current renewal period would expire, to-wit, before June 1, 1970. The Commission's action granting Lamar's renewal application was to be vacated which thereby would restore that application to pending status to be treated with in the new hearing. As indicated in Lamar's Petition for Writ of Certiorari (p. 5 and fn. 10), Lamar did not seek certiorari at that time because the Court's September 5, 1969, Statement made it clear that Lamar's renewal application was not denied and that its right to operate under Section 307(d) of the Communications Act, 47 USC §307(d), would be recognized—at least for the short time contemplated by the court below during which an expedited hearing would be held.

Instead, the Commission delayed the vacating of its action until December 5, 1969, and did not designate the new applications for hearing until May 4, 1970, with the first pre-trial conference to be held in June, 1970,—*after* the termination of the renewal period on June 1, 1970.

When the Commission designated the new applications for hearing, it expressly recognized the pendency of Lamar's renewal application. Its May 4, 1970 Order, *Lamar Life Broadcasting Co.*, 25 FCC 2d 101 (1970), stated, in part, as follows:

> ". . . we wish to make clear that Lamar will be judged on its basic [new] application (BPCT-4320). The grant or denial of the *pending renewal application* (BRCT-326) for station WLBT(TV) will rest on the determination made with respect to BPCT-4320." [Emphasis and bracketed material supplied.]

Thus, the entire premise of the Government's position—that Lamar is no longer a pending renewal applicant—has been rejected by the clear language of the Court of Appeals and of the Commission itself. Accordingly, the mandates of two statutes, Section 307(d) of the Communications Act, 47 USC §307(d), and Section 9(b) of the Administrative Procedure Act, 5 USC §558(c), guarantee to Lamar the right to operate until its pending renewal application receives final disposition by the agency—an act which has not yet occurred.[1]

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[1] The Government's contention (Gov. Br. 12, fn. 10) that the Commission cannot be faulted for its May 21, 1971 Order implementing its earlier Order designating CII as interim operator misconceives the point of Lamar's Supplemental Brief to this Court. The question is not whether the Commission was prevented from acting by stay but rather whether its action was an unlawful implementation of its prior Order. The Commission could not, as its May 21, 1971 Order purports to do, lawfully *direct* Lamar to operate WLBT in CII's behalf from April 17, 1971 to June 14, 1971, using Lamar's own capital, equipment and staff, and to turn over the profits for such period to CII, with no recompense whatsoever from CII. The May 21, 1971 directive clearly deprives Lamar of its property contrary to law.

In order to avoid the clear protective language of these statutes, the Government is forced to fashion the thesis that Lamar is no longer a renewal applicant and that the Court ". . . terminated the license renewal aspect of the proceedings . . ." (Gov. Br. 9). But to reach this result the Government necessarily must take the position that the Court of Appeals either denied or directed the denial of the renewal application—an act clearly beyond the Court's power. (*FRC* v. *Nelson Bros. Co.,* and other authorities cited *supra,* p. 2). If the decision of the Court of Appeals here on review stands for the proposition that consideration of Lamar's renewal application has been terminated, the Court's action constitutes an unlawful denial of that application.

CONCLUSION

The writ should be granted for the reasons stated in the Petition, in Petitioner's Supplemental Brief, and in this Reply Brief.

Respectfully submitted,

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